Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6639

BOBBY JOE WILLIAMS and
ALLEN CLAYBURN JUSTUS,

Petitioners,

- v -

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered September 17, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 542 P.2d 554 (Okla. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1 - 44, infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The opinion below was reaffirmed on rehearing on November 25, 1975. The time within which a petition for certiorari might be filed was extended by order of Mr. Justice White, dated February 17, 1976, to March 24, 1976, and further extended by order of Mr. Justice White, dated March 15, 1976, to April 23, 1976.

QUESTIONS PRESENTED

1. Does the post facto invalidation of a statutory provision empowering an appellate court to conduct an evidentiary hearing and thereafter to reduce the death penalty imposed for the crime of first degree murder violate Article I, Section 10 of the Constitution or the Fourteenth Amendment, where the effect of such an invalidation is to subject a criminal defendant to an irreducible death sentence that was not authorized by law at the time of his offense?

2. Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Oklahoma violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

3. Did the exclusion for cause of venirement on the ground of expressed attitudes toward the death penalty violate petitioners' rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

4. Was petitioner Williams deprived of due process of law by the admission, for consideration of the jury, of statements as to which an independent determination of voluntariness had been requested, but had not been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the Ex Post Facto Clause of Article I, Section 10 of the Constitution of the United States.

2. This case also involves the following provisions of Oklahoma law:

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

"Murder in the first degree.

"Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing or the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly

transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

"Punishment for murder in the first degree -- Instructions regarding lesser and included offenses.

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

21 Okla. Stat. Ann. §701.5 (1975-76 Supp.)

"Review of judgment and sentence of death.

"The Court of Criminal Appeals when reviewing a judgment and sentence of death shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

21 Okla. Stat. Ann. §701.6 (1975-76 Supp.)

"Modification of death sentence.

"Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the penitentiary at hard labor."

STATEMENT

Petitioners were convicted after a jury trial in the District Court of Oklahoma County of murder during the course of an armed robbery.

The murder victim, Ms. Cherry Lee Kennedy, had been operating a convenience store on October 30, 1973. (T.359.) Officer Adam Knight testified that at 4:30 on the morning of October 30 he was called to the convenience store where he observed the body of a woman later identified to him as Ms. Kennedy. (T. 339.) He also observed that the cash register was open and empty of money. (T.341.) The supervisor of the store testified that "approximately thirty-two dollars and some change" were missing and that the "normal stock of cigarettes on the counter was low." (T.361.) Ms. Kennedy had suffered a gunshot wound to the head, identified as the cause of death, and additional gunshot wounds to the shoulder and right temple. (T.417-19.)

A twelve year old boy testified that he had found a gun by a fence which he took home to his father who called the police. (T. 356-57.) Officer Kirby testified that he delivered the gun to a firearms expert and that he thought the date of delivery was October 31. (T.368.) The firearms expert, who had also received a bullet recovered from the body of the victim (T.365), testified that the bullet had been fired from the gun which the boy had found. (T.367.)

Harrison H. Latham testified that he had sold a gun on October 20, 1973 to petitioner Williams. (T.344.) He had not taken the serial number of the gun or had it registered, but he felt able to identify it as the murder weapon because the handle

had been "varnished or shellacked very crudely." (T.345.) He stated that he thought "LA Deputy" was imprinted on the barrel, but upon inspection he was unable to find it. The gun was deemed properly identified and admitted when a police officer subsequently located the imprinted matter. (T. 406, 416.)

A video tape statement of petitioner Justus was admitted in evidence as well as a signed, written statement of petitioner Williams. The Williams statement, in question and answer form contained the following admission:

> "Allan Justus and I was sitting by the Fina Service Station by W.W. 59th and High. I was going to go in there masked and rob him. But there was too much traffic. So we decided not to do it. We were on our way back home and I remembered a store that could be hit. While we were on our way we was talking about it. Allan said that killing someone was the easiest thing in the world to do and get away with it. He said if I was to go in the store unmasked that no one would suspect it was being robbed. No one would ever know about it because there wouldn't be any witnesses. We stopped at the store, I went in, told her to put the money in the sack, she did so and I was grabbing some cigarettes with one hand and had the gun in my left hand, when I was trying to put the Marlboro cigarettes in my left hand and the gun in my right hand, the gun accidentally went off. I think it shot her and after that I just started shooting her until it wouldn't shoot anymore and ran back to the car, we started going down deadend streets and I threw the gun outside the car and we went home."

(T.392.) It also contained the information that the proceeds of the robbery had been "about $30." (T.393.)

The transcript of proceedings does not include the video tape statement of petitioner Justus, but it is accurately summarized as follows in the opinion below:

> "In this video tape statement defendant Justus was first advised of his rights and then acknowledged the same by executing a waiver of

rights form. Regarding the subject offense, he then related that at about 3:30 to 3:45 a.m. on the night thereof, he and defendant Williams were riding around in the car of defendant Justus looking for someone, or something, to hit when his co-defendant directed him to Tom's Market. He did not personally favor this location, but defendant Williams was familiar with the store and had observed quite a bit of money there. He parked the car on the north side of the store with the engine running and defendant Williams entered the store with a gun and wearing gloves. While in the car, he heard four shots, and interjected that there were not supposed to be any shots fired but only a robbery. Defendant Williams then came running out with two cartons of Marlboro cigarettes and a bag of money, and said that he had shot her once in the hip and three times in the face and he was sure she was dead. While fleeing the neighborhood in his car, they then kept running into deadend streets. Defendant Williams asked him what should be done with the gun, and upon his advice defendant Williams then wiped the gun and threw it from the car while he was watching the road and looking for police cars. They then drove home and evenly split the money, estimated at $32.00 plus some change, and each took one of the two cartons of cigarettes. When arrested, each defendant had one package of Marlboro cigarettes, and he stated that these came from those cartons taken in the robbery. Defendant Justus further described and identified the gun used in the robbery, and explained that he had recommended the gun to defendant Williams when his co-defendant purchased it at a swap meet, and that he thereafter fired the gun in target practice."

Both petitioners testified regarding the circumstances under which the statements were taken.[1/] Petitioner Williams was

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1/ Petitioners were arrested on November 2 (T.229) at 4:30 p.m. (T.246) outside the home of petitioner Justus (T.274). The police had been looking for petitioner Williams; petitioner Justus was only arrested because he was with petitioner Williams (T.248). The Justus video tape statement was taken on November 3 (T.188) during a taping session which began at about 6:00 p.m. (T.199) and lasted until "very late evening or early morning (id.). Two tapes were taken of each petitioner; one of Ms. Kimbrough and one of Ms. Justus. (T.198-99.) The written statement of Mr. Williams was taken on November 5 at 6:35 p.m. (T.262.)

twenty years old. (T.475.) At the time of his arrest he had been living with Ms. Gayle Kimbrough (id.) who was pregnant (T.494) and was arrested on the same day together with the wife of petitioner Justus (T.482,521). He testified that he had not given the statement; that it was entirely untrue and that he had signed it because Ms. Kimbrough had been threatened and because he was promised that he would be released if he did so. He said that he had asked for a lawyer but was not able to see one until after the statements were taken. (T.480-81.) He admitted that he had bought the gun, but said that he had sold it on October 28 or 29 to an Alton Oliver. (T.486.) At the time of his arrest he was on parole "for embezzlement" (T.499); he had a prior conviction for riding a stolen car across state lines (T.500). He also testified that he had overheard Officer Knight say of petitioner Justus, "[t]here is a guy I would like to see get shot in the head." (T.482.)

Petitioner Justus stated that he had been convicted of forgery and attempted larceny of a motor vehicle and that he had had a juvenile conviction in 1965. (T.536.) He testified that shortly prior to petitioners' arrest he had purchased nine "hits" of LSD (T.527), and that he had taken one immediately (T.538). When he saw the officers in unmarked cars with long antennae (T.548), he swallowed the remaining eight (T.538). He asked for a lawyer every time he was questioned but was cold that he would get one when he got to the county jail. (T.541.) During a period of interrogation Officer Knight said to him "'You're high, aren't you?'" Petitioner denied it, and the officer replied "'I am not blind, I can see you pupils.'" (T.542.) He then said "'You're gonna help me clear up this case.'" (T.543.) When petitioner

Justus denied knowledge of the crime the officer pulled a gun and "laid it on the table with his hand on it." (Id.) Justus thought he was hallucinating and laughed, at which point the officer said "'I assure you this is no joke." (Id.) Petitioner Justus then rehearsed the statement. (Id.) He refused to sign a written statement despite threats that he would be shot "for escape." (T. 544.) Petitioner Justus testified that he was at home on the night of the murder (T.545) but that he had been with petitioner Williams when be bought the gun and when he gave it to an Alton Oliver (T. 546).

Gayle Kimbrough testified that she had never been arrested before; that she was threatened and abused by police officers and that she had signed a statement which she did not read at the time, but later read and found to be partially false. (T. 523-25.)

The father of petitioner Justus testified that he was called by Officer Knight at about midnight on the day of his son's arrest and asked to come to the police station to talk with petitioner. (T.553.) He testified that petitioner was "real glassey-eyed, and his speech was rather slow at times, and he would roll his eyes back in his head every once in awhile." (T.554.) He was not able to find a lawyer who would see his son until after the statements had been taken. (Id.)

The wife of petitioner Justus testified that he had been with her on the night of the crime (T.557); that she had been arrested as an "accessory to murder" and questioned by Officer Knight (T.558-59) and that she had made a statement in which she said what her husband had told her to say because

he had warned her that if she didn't he would never get out of jail (T.560). On cross examination she was confronted with a prior statement in which she had said that she was told by her husband that petitioner Williams had robbed the store and that he should not have been with him.

Mr. Ed McConnel, an attorney who went to see petitioner Williams on the evening of November 5, testified that Williams had "a strange look in his eyes" and that "he couldn't understand what he was saying. He didn't make sense at all." (T.514-15.)

On rebuttal Elizabeth Huff, a police department report clerk, testified that she had typed petitioner Williams' statement exactly as he had given it. (T. 570-76.) The officer who had interviewed Ms. Kimbrough denied that he had abused her. (T.602.) Officer Knight denied that the interview described by petitioner Justus occurred [2/] or that he had threatened him or said that he should be shot. (T.590-91.) Officer Guin, one of the arresting officers, testified that petitioner Justus' wife had talked with him "in private" and that he had heard him tell her to tell the truth. (T. 580, 588-89.) He did not see petitioner Justus put anything in his mouth at the time of the arrest. (T.586.) Officer Guinn had previously testified that

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2/ At the suppression hearing, Officer Knight testified that he had shown a gun to petitioner Justus after the taping and in connection with another homicide: "I had him look at the chrome plated revolver to see if he knew what a chrome plated revolver was . . . ." (T.231.)

Justus had agreed to make his statement after being shown a statement made by petitioner Williams. (T.455.) He had described the circumstances of the arrest as follows:

> "We had set up surveillance . . . saw a blue Corvair . . . pull into the parking lot. We saw two men get out . . . We recognized one . . . as Mr. Williams. We saw them going in toward the apartment complex, we immediately followed them, got out of our car. It was about a half a block away when we first saw them.
>
> We ran to the stairway where they were ascending at that time. The three of us pulled out our service revolvers while their backs were still to us. I told them they were under arrest, we were police officers.
>
> They immediately turned around and faced us."

(T.460.) He also said that petitioner Justus stuttered and appeared scared, but didn't appear to be drunk or "under the influence." (T. 459,463.)

Substantially similar but more detailed testimony regarding the circumstances of petitioners' arrest and interrogation had been presented at an in camera hearing regarding the admissibility of the statements. At the conclusion of that hearing the court made the following ruling with regard to petitioner Williams' statement:

> "It is my understanding of the law that the question is: Was it voluntary? And No. 2: Was it given after being admonished of their rights in the Miranda decision of the United States Supreme Court? Now, we have one testimony of the officer and the instrument itself, was that they did advise him, that he was advised. And that he signed it freely, and voluntarily after the Miranda warning that he testified that he gave to the Defendant, in the face of the statement itself said he was advised, plus the fact that Defendant Williams said himself that he signed the statement.

From the Defendant's point of view of this statement, they say it was not voluntary, that he did not read it, he didn't understand it, he didn't know what he was signing, that he had signed it to keep this lady, his common-law wife, and fiance, out of jail, and he further testified that the lady was married to someone else.

She cannot be his common-law wife under the law, she couldn't be his common-law wife if she's already married to someone else. I don't know whether you can be a fiance to somebody else while you are married to another person or not, I don't know. But I don't think that is really that material. He has testified that he didn't understand it, it was against his will, and so forth. I think that makes it a question of fact for the Jury to decide: The voluntary statement, whether it's voluntary or not. I don't find under the evidence in this case that as a matter of law, that it is un-voluntary [sic] statement.

You have a conflict between the statement itself, testimony of the officer, and the testimony of the Defendant. So I will leave that up to the Jury to decide as to whether or not under proper instructions, whether it's voluntary.

If the Jury finds that the statement is not voluntary, then they will be instructed to disregard it. If they do, under the law as you gentlemen know, they can consider it. But I think you have a question of fact to be determined by the Jury, not by the Court."

(T.308-10.)

The ruling with regard to petitioner Justus' statement was similar:

"I am going to rule that the test laid down by the Court of Criminal Appeals is tht the confession is voluntary, and wasn't done after the proper Miranda warning?

Now, the Court has never distinguished between the form of a confession as to whether it is admissible or inadmissible. Oral confessions have been admitted, if they pass the test of the law. Written statements have been admitted. . . .

So, I think under those circumstances that this video tape, State's Exhibit No. 1, meets

> the test as laid down by the Court of Criminal Appeals of this State. I think it is admissible evidence in this case, and I will so rule that it is admissible in this case.
>
> The other part that complies with it, the same thing. The State has said that it is voluntary, put on proof to that affect. The Defendants take the position that was not voluntary, and it was not true. These are questions of fact for the Jury to determine.
>
> These are questions that I am not to pass on, questions of facts for the Jury to pass on, so they will be admitted. . . ."

(T.318-19.)

Petitioner Williams' attempt to introduce a video tape statement he had given to police officers prior to the taking of his written statement was denied on the grounds that it was self serving and its admission would be prejudicial to petitioner Justus. (T. 470.)

The jury, having been instructed only with regard to murder in the first degree (T. 626), retired at 5:10 p.m. (Tr. 706.) Their deliberations were interrupted for a dinner break (Tr. 709) and for a second viewing of petitioner Justus' statement (T.710). Guilty verdicts fixing the penalty as death were returned as to both defendants at 8:43 p.m. (T.711.) On March 29, 1974, each defendant was accordingly sentenced "to death by electrocution." (Tr. 719, 727.)

Two potential jurors and one potential alternate had been excused for cause after having said that they were unable — or doubtful as to their ability — to inflict a death penalty. (Tr. 25-26, 38-40, 170-171.)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On appeal to the Court of Criminal Appeals petitioners assigned as error and briefed the constitutionality of the death penalty and of the exclusion for cause of death scrupled jurors. Both contentions were expressly rejected below. Williams v. State, 542 P.2d 554, 577-87, 569-70. In addition petitioner Williams assigned as error and briefed the constitutionality of the admission in evidence of his statement to the police in the absence of a prior ruling as to its voluntariness. That contention was also explicitly rejected. Id. at 571-72.

On rehearing, petitioners briefed and argued the contention that imposition of the penalty of death in their cases would, in view of the decision of the Court of Criminal Appeals severing provisions for imposition of an alternate sentence after a hearing on appeal, violate the ex post facto provisions of the Constitution of the United States. This contention was rejected in an opinion on rehearing. Id. at 596-97.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

In order to spare the Court repititious argument, petitioners adopt, as to this issue, the reasons set forth at pages 10-20 of the Petition for Certiorari in Green v. Oklahoma, No. 75-6451. The relevant portions of that petition are attached as Appendix B.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners' contentions that the laws under which they were convicted and sentenced fail to preclude arbitrary infliction of the death penalty, and that this is so largely because those laws are excessive, regressive and inconsistent with contemporary standards of decency, are similarly presented by incorporation of pages 10-16 and 20-38 of Appendix B.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONERS' RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

During the selection of petitioners' jury, three panel members were excluded because of their expressed attitudes toward the death penalty. In holding that these exclusions were not error, the Court of Criminal Appeals relied upon its holding in Justus v. State, 542 P.2d 598 (Okla. Cr. App. 1975). Williams v. State, supra, 542 P.2d at 570. Justus held that "the applicability of Witherspoon is limited to those cases where, upon conviction for the offense charged, the jury has discretion to resolve whether the defendant shall suffer death or some lesser degree of punishment," id. at 603. The Justus court deemed a state-law "bias" test the appropriate standard for determining whether veniremen were properly excluded on account of their death penalty scruples in a capital case:

> "The inapplicability of Witherspoon to the present case, however, does not mean that the exclusion for cause of jurors antagonistic to capital punishment is without standard. In such cases, the appropriate basis for challenge may be for implied bias or actual bias to the extent that the personal scruples or opinions of a veniremen will not yield to what the Legislature has determined to be the law." 3/

3/ The court defined this state-law standard as follows:

> "With respect to implied bias, 22 O.S. 1971, § 660, provides, in pertinent part:
>
> > 'A challenge for implied bias may be taken for all or any of the following cases, and for no other:
> >
> > * * *

The application of this standard represents a fundamental misapplication of Witherspoon v. Illinois, 391 U.S. 510 (1968).

The basic question presented here is the extent to which the State is empowered to sweep from the jury those veniremen with conscientious scruples against the death penalty under capital trial procedures in which the jury does not make a separate determination of sentence after it has ascertained guilt. The court below clearly applied a standard, see note 3 supra, which allows the exclusion of veniremen on account of their feelings concerning the death penalty upon a "broader basis" than the standard which Illinois was held to have violated in Witherspoon, 391 U.S. at 522, n. 21.

Witherspoon is fully applicable to a death penalty procedure such as Oklahoma's (as a number of state courts have held, see People v. District Court, Col. Sup. Ct. No. 27078 (March 11, 1976); Hovila v. State, Tex. Ct. Crim. App. No. 49,396 (April 30, 1975); Owens v. State, __ Ga. __, 214 S.E.2d 173 (1975); State v. Trivitt, New Mexico Sup. Ct. No. 10,159

3/ (Continued)

> 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror.'

Regarding challenge for actual bias, 22 U.S. 1971, § 659, provides in pertinent part:

> 'Particular causes of challenge are of two kinds:
> * * *
>
> 2. For the existence of state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias.'"

Justus v. State, supra, 542 P.2d at 605.

(Feb. 17, 1976); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); and see State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974)) for two reasons. First, although the primary focus of the Witherspoon decision was on the jury's pre-Furman role of "determin[ing] whether [a defendant's] . . . sentence should be imprisonment or death," Witherspoon v. Illinois, supra, 391 U.S. at 518 (footnote omitted), the Court also laid down standards for exclusion of jurors whose death-penalty scruples might interfere with their determination of the separate question of guilt or innocence. The Court noted that:

> "statutes and rules disqualifying jurors with scruples against capital punishment are often couched in terms of reservations against finding a man guilty when the penalty might be death . . . . Yet, despite such language, courts . . . have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine guilt in accordance with the evidence and the law. See, e.g., . . . Smith v. State, 5 Okla. Cr. 282, 284, 114 P. 350, 351."

Witherspoon v. Illinois, supra, 391 U.S. at 513, n. 5 (emphasis in original). The Court ruled that before veniremen could be excluded on the ground that their death penalty scruples made them biased on the issue of guilt, it must be "made unmistakably clear . . . (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 523, n. 22 (emphasis omitted).

Second, the distinction of Witherspoon offered by the Court of Criminal Appeals — that "the jury no longer acts as 'arbiter of the punishment to be imposed' but is limited to a determination of guilt or innocence," 542 P.2d 605 — proves either too much or too little. If the court is saying that attitudes regarding capital punishment can play no part in a jury's determination of guilt or innocence of a capital crime, then Oklahoma manifestly has no business death-qualifying jurors at all. But if, as the death-qualification practice approved

below attests, attitudes concerning the death panelty can affect jurors' votes on guilt or innocence (or on degree) — and if a State undertakes to exclude jurors for this very reason — then a jury selected by the systematic exclusion of death-scrupled jurors is something other and less than a jury representative of the whole community in regard to the questions which the jury must decide. The point, of course, is that under Oklahoma's post-Furman procedure the jury acts simultaneously to determine both guilt and punishment.[4/] While Witherspoon may allow the exclusion of veniremen who are demonstrably biased, under an appropriate standard, against the imposition of the death penalty, Witherspoon also specifies in terms the minimally acceptable constitutional standard for exclusion: it must be made "unmistakably clear . . . that . . . [the excluded jurors] would automatically" reject a verdict carrying the death penalty. Witherspoon v. Illinois, supra, 391 U.S. at 523 n. 22 (emphasis omitted).

The difference between the state-law "bias" test and the Witherspoon test for exclusion of death-scrupled jurors is that the former creates a presumption of excludability from the uncertainty of a venireman as to his views or from his inability to state unequivocally whether he could return a verdict whose consequence was death:

4/ This point applies with even greater force with regard to the Oklahoma death penalty statute than with regard to the typical "mandatory" death penalty statute. For the Oklahoma juror is required to include in any capital verdict an affirmative statement "that the defendant shall suffer death." 21 Okla. Stat. Ann. § 701.3 (1975-76 Supp.). Although the Court of Criminal Appeals has indicated that a failure to do so would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-579, the provision stands to complicate the moral dilemma of the death scrupled but conscientious juror by apparent overlap of the sentencing and guilt determination processes, and to invite voir dire interrogation regarding the ability to impose a sentence of death rather than the ability to return a verdict of guilt, consistent with the evidence, regardless of the knowledge of future sentencing consequences.

> "a challenge for cause is appropriate to the extent that the venireman is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror . . . . Clearly, no prospective juror with animosity concerning the death penalty should be excused upon this basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if satisfied of the defendant's guilt beyond a reasonable doubt, a venireman is unresolved as to whether he could then assess the death penalty, or knowing the death penalty to be mandatory upon conviction, he is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, then he has to that extent forewarned the court that he is undecided whether he could comply with the oath of a juror. A challenge for cause should be granted against such a venireman."

Justus v. State, supra, 542 P.2d at 607. Witherspoon, however, requires that a venireman's sentiments be made "unmistakably clear" before he may be excluded for cause; and in Funicello v. New Jersey, 403 U.S. 948 (1971), this Court applied Witherspoon to invalidate precisely the same "equivocal and uncertain" ground of exclusion adopted by the Court of Criminal Appeals here. See Forcella and Funicello v. State, 52 N.J. 263, 245 A.2d 181 (1968).

Each prospective juror in this case was asked, " . . . in a case where the law and the evidence warrant, in a proper case, could you without doing violence to your conscience, agree to the verdict imposing the death penalty." (See e.g. T.19.) Each panel member who gave a negative response was asked whether his or her reservations were such that irrespective of the facts he or she could not vote for a penalty of death. (See, e.g. T. 20.)

Veniremen Hall and Espolt gave simple negative answers to the second of these questions; each was excluded without further inquiry. (T. 26, 170.) Although the court did discuss with the prospective jurors their duty to follow the law as given in his instructions regardless of agreement or

disagreement with those laws (T. 35), it did so after the exclusion of venireman Hall, and it did so in general terms, without reference to the death penalty and outside the context of any discussion of scruples regarding capital punishment. It was therefore not established with "unmistakable clarity" that either of these veniremen could not "subordinate . . . personal views to what he . . . perceives to be his duty to abide by his oath as a juror and to obey the law of the State." Witherspoon v. Illinois, supra, 391 U.S. at 514-15 n. 7.

The impropriety of the exclusion of venirewoman Angel was blatant. When the court asked the second of its standard questions regarding the death penalty, the following exchange occurred:

> "THE COURT: Please listen to me very closely, are your reservations about the death penalty such that regardless of the law, the facts, and the circumstances of the case, you could not inflict the death penalty if you found beyond a reasonable doubt that the Defendants or either of them were guilty of murder in the first degree? Do you understand what I am asking you?
>
> MRS. ANGEL: I would have to go along with the law, but regardless of the law, did you say?
>
> THE COURT: Well, you understand, Mrs. Angel, if the State fails to prove the Defendants guilty beyond a reasonable doubt, it would be your duty along with the other Jurors to find the Defendant not guilty.
>
> MRS. ANGEL: Right.
>
> THE COURT: But if the State proved to your satisfaction and the other members of the Jury beyond a reasonable doubt that the Defendant or Defendants or either of them are guilty of murder in the first degree, the law of this state provides only one punishment, that is death. And so what I am asking you is, irrespective of that law, are the facts and circumstances of the case, is your reservations about your feelings about the death penalty such that irrespective of the facts of the case, are you saying that you could not vote for a penalty of death?
>
> MRS. ANGEL: No, I think I am saying it would be difficult, but I would go ahead if beyond a reasonable doubt.

THE COURT: Then you could impose it if you found the facts to be such? You could do that?

MRS. ANGEL: Yes, if my conscience ---

THE COURT: I won't excuse the Juror for cause at this time." (T. 21-22.)

Ms. Angel was subsequently questioned by the State and questioned further by the trial judge:

"MR. HARRIS: . . . Mrs. Angel, you just don't believe in the death penalty, do you?

MRS. ANGEL: I just find it hard to believe in the death penalty. I am sorry. You know it is an opinion, a personal opinion. I would comply with the duty, I would have to if I served on this Jury.

MR. HARRIS: In other words, as the Court has told you, these Defendants were charged with murder while committing an armed robbery. Oklahoma Statutes make that a death penalty offense . . .

MR. HARRIS: Now, that being the case, you could put aside all your personal beliefs about the death penalty if you found beyond a reasonable doubt these two men committed murder while engaged in an armed robbery, you could find them guilty of first degree murder, and assess the death penalty, could you not?

MRS. ANGEL: I am going to revert to my first answer and say I am not sure, and I don't think I would be capable of serving on the Jury. I want to be fair, I really do. I don't want to get out of my duty, but I don't believe I could.

MR. HARRIS: You don't think you could serve on this Jury, you don't want to serve on this Jury feeling this type of case, do you? [sic]

MRS. ANGEL: I am sorry.

MR. HARRIS: We ask the Juror be excused for cause, Your Honor.

MR. LEATHERMAN: I object to it.

MRS. ASKINS: We object on the form on the form of the question, Your Honor. In proper voir dire question. The District Attorney attempts to draw his own - - -

THE COURT: Mrs. Angel, if I understand your answer to Mr. Harris, you don't believe, if the State proved to your satisfaction beyond a reasonable doubt that the Defendants while engaged in an armed robbery, committed murder in the first degree, that you could not vote the death penalty; is that correct?

MRS. ANGEL: I would vote the death penalty, but it would upset me. You said would it do violence to my conscience, I think it would, I am trying to be fair.

THE COURT: But if you found the facts to be such in this particular case?

MRS. ANGEL: I would. I would feel it my duty, I would have to, if I were on the Jury, yes, I would.

THE COURT: You understand if you should find, that is up to you as a Juror, I am not suggesting what you find, but should you find as a Juror these Defendants are guilty of murder in the first degree, that the punishment for it is death, you understand that?

MRS. ANGEL: Yes.

THE COURT: And if you found them guilty as Mr. Harris has asked you, would you and could you vote for the death penalty?

MRS. ANGEL: I would find it very hard, I will be honest. No, I don't believe I could.

THE COURT: You don't believe you could.

MRS. ANGEL: No, I don't believe I could. I am being completely honest.

THE COURT: You have answered me and Mr. Harris two or three different ways.

MRS. ANGEL: I know, I am trying to assess myself.

THE COURT: I want you to think about it. I want you to express your true and honest convictions about this matter.

MRS. ANGEL: I am trying to ask myself whether I will be able to do such, and I am not sure I would be able to, so I think the only fair thing for me to do, I perhaps won't be able to in all conscience vote for the death penalty.

THE COURT: Irrespective of the facts? I'll excuse the lady for cause, and Defendants, both Defendants, will be given an exception to the ruling."

(T. 37-39.) Surely Ms. Angel's honesty, during intense questioning, in saying that she "perhaps" would not be able to "vote for the death penalty,"[5/] despite her repeated assertions that she would abide by the law to the best of her ability, did not make it "unmistakably clear" that she would "automatically" reject a verdict imposing a death penalty.

The right of a capital defendant to a fair and impartial trial in which the "scales . . . are not deliberately tipped toward death," Witherspoon v. Illinois, supra, 391 U.S. at 522 n. 20, is fundamental:

> "the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate . . . and we have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today."

Witherspoon v. Illinois, supra, 391 U.S. at 523 n. 22. The Court should grant certiorari in this case to determine whether Oklahoma has not impermissibly diluted a capital defendant's right to a jury selected in accordance with Witherspoon's requirements.

5/ See, n. 4 , supra.

IV

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER WILLIAMS WAS DEPRIVED OF DUE PROCESS OF LAW BY THE ADMISSION, FOR CONSIDERATION OF THE JURY, OF STATEMENTS AS TO WHICH AN INDEPENDENT DETERMINATION OF VOLUNTARINESS HAD BEEN REQUESTED BUT HAD NOT BEEN MADE.

After an in camera hearing as to the admissibility of petitioners' statements to the police, the court summarized the evidence presented by each side and ruled as follows:

> "I think that makes it a question of fact for the Jury to decide: The voluntary statement, whether it's voluntary or not. I don't find under the evidence in this case that as a matter of law, that it is unvoluntary [sic] statement.
>
> You have a conflict between the statement itself, testimony of the officer, and the testimony of the Defendant. So I will leave that up to the Jury to decide as to whether or not under proper instructions, whether it's voluntary.
>
> If the Jury finds that the statement is not voluntary, then they will be instructed to disregard it. If they do, under the law as you gentlemen know, they can consider it. But I think you have a question of fact to be determined by the Jury, not by the Court."

(T. 310.) It is clear from the face of this ruling that the requirements of Jackson v. Denno, 378 U.S. 368 (1963), as interpreted by Sims v. Georgia, 385 U.S. 538 (1966), had not been met, for

> "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity."

Id. at 544. (Emphasis added.) And that conclusion must "includ[e] resolution of disputed facts upon which the voluntariness issue may depend." Jackson v. Denno, supra, 378 U.S. at 391.

The meaning of the trial court's assertion that the statement was not "unvoluntary" as a matter of law is unclear. The record does reflect, however, that counsel for petitioner Williams had taken the position that "Once . . . a suspect has refused to waive his Constitutional Fifth Amendment privilege, the officers have no more right to try to talk with him " (T. 294) and that he was questioned on this point by the court (T. 295-96);[6] it is conceivable that this is the "matter of law" to which the court referred.

The contention that the trial judge did not consider it his duty to weigh the evidence and resolve factual questions is buttressed by examination of his disposition of petitioner Justus' motion to suppress. After noting that "the test laid down by the Court of Criminal Appeals is that the confession is voluntary, and wasn't done after the proper Miranda warning" (T. 317), he addressed the question whether different standards should apply to taped confessions, determined that they should not and said

> "The other part that complies with it, the same thing. The State has said that it is volontary, put on proof to that affect [sic]. The Defendants take the position that was not voluntary, and it was not true. [7] These are questions of fact for the Jury to determine.
>
> These are questions that I am not to pass on, questions of facts for the Jury to pass on, so they will be admitted. . . ."

(T. 318-19.)

---

[6] "THE COURT: Is it your position that under the law that once he remains silent when he's advised of his rights, then the Defendant remains silent there, that they couldn't advise him of his rights again and have the Defendant give a statement? Is that your understanding of the law, Mr. Jordan?" (Id.)

[7] The joinder of the issues of truth and voluntariness in this ruling is further evidence of a misconstruction of Jackson v. Denno, for its very purpose was to assure, to the extent possible, independent findings of "truthfulness" and "voluntariness." Jackson v. Denno, supra, 378 U.S. at 386.

This Court should grant certiorari to determine whether petitioner Williams' right "to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession" [8] was fully and conscientiously protected.

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8 / Jackson v. Denno, supra, 378 U.S. at 377.

CONCLUSION

Petittioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

SEP 17 1975
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BOBBY JOE WILLIAMS, and ALLEN CLAYBURN JUSTUS,

Appellants,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

FOR PUBLICATION

No. F-74-648 and No. F-74-650

AUTHORIZED FOR FILING
SEP 17 1975
COURT OF CRIMINAL APPEALS

- SYLLABUS -

1. Where upon conviction for the offense charged the assessment of the death penalty is mandatory, the appropriate basis for challenge for cause against veniremen antagonistic to capital punishment may be for implied bias or actual bias to the extent that the personal scruples or opinions of prospective jurors will not yield to the law as enacted by the Legislature, and the pertinent voir dire inquiry is whether, in view thereof, the veniremen can deliberate upon the evidence impartially under the law and assess such punishment should guilt be established beyond a reasonable doubt.

2. No venireman with animosity concerning the death penalty should be excused upon that basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if knowing the death penalty to be mandatory upon conviction, a venireman is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, or if satisfied of the defendant's guilt beyond a reasonable doubt, he is unresolved as to whether he could then assess the death penalty, then a challenge for cause is appropriate to the extent that the venireman is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror. A challenge for cause should be granted against such a venireman, for otherwise the administration of the oath would be frivolous and create chaos resulting in our system of jurisprudence being a mockery based upon the personal whims of individuals. The State, as well as the defendant, is entitled to a fair and impartial jury.

3. In this jurisdiction, the trial judge first hears the evidence regarding the admissibility of a confession, himself resolves evidentiary conflicts and gives his own answer to any coercion issue, rejecting confessions he deems involuntary and admitting only those he believes voluntary. Only the latter confessions are heard by the jury, which may then under this procedure, disagree with the judge, find the confession involuntary, and ignore it. Given the integrity of the preliminary proceedings before the trial judge, this procedure does not pose hazards to the rights of a defendant. The jury does not hear all confessions where there is a fair question of voluntariness, but only those which a judge actually and independently determines to be voluntary, based upon all the evidence. The judge's consideration of voluntariness is carried out separate and

aside from issues of the reliability of the confession and the guilt or innocence of the accused, and without regard to the fact the issue may again be raised before the jury if decided against the defendant. The record will show the judge's conclusions in this regard, and his findings upon the underlying facts may be expressed or ascertainable from the record.

4. Mere delay in arraignment of a prisoner will not render the statement or confession involuntary, nor inadmissible, if it is otherwise shown to be voluntary and given without coercion, fear produced by threats or mistreatment, or promises.

5. This Court will not disturb the trial court's ruling permitting the introduction of a confession if supported by sufficient evidence that the defendant knowingly and intelligently waived his rights and understood the consequences of said waiver.

6. When a confession is admissible, the whole of what the accused said upon the subject at the time of making the confession is admissible and should be taken together. If the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self-serving declarations connected therewith. To be admissible, however, it must clearly appear that the exculpatory statements were made in the same confession or conversation sought to be introduced in evidence, and not upon other or separate occasions. Only to the extent that the self-serving declaration is sufficiently related in both time and subject matter to the confession, is there an adequate guarantee of testimonial trustworthiness to justify admission as an exception to the hearsay rule.

7. The clearest case of hearsay is where a witness testifies to the declarations of another for the purpose of proving the facts asserted by the declarant. The hearsay rule, however, does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or its falsity, such evidence is admissible as a verbal act. However, the exculpatory assertions within an extrajudicial statement offered to prove the involuntariness of a subsequent and distinct confession, are irrelevant apart from the truth or falsity thereof, and therefore within the rule against hearsay.

8. When with prior knowledge one defendant seeks to introduce evidence in his own behalf prejudicially violative of the rights of his co-defendant, a timely motion for severance must be presented by defense counsel, apprising the trial court of the circumstances that may develop which might prejudice the co-defendant. Neither the State nor the court should be required to anticipate whether one defendant might seek to introduce evidence so prejudicial to a co-defendant that a severance would be necessitated. A presumption of prejudice does not arise from joinder, and without such information a judge cannot be presumed to know that prejudice will result therefrom.

9. The authenticity of a video tape confession is sufficiently established by a witness who specifically identified the video tape and testified that as presented this exhibit was a true and correct representation of the actual events depicted therein, and that the original tape had not been altered or tampered with in any manner. If a proper foundation is laid for the admission

of a video tape by showing that it truly and correctly depicts the events and persons shown, and that it accurately reproduced the defendant's confession, such a device is an advancement in the field of criminal procedure and a protection of defendant's rights.

10. The introduction of photographs taken subsequent to a homicide is largely within the discretion of the trial court and not a cause for reversal absent an abuse thereof. Although it is error to receive in evidence gruesome photographs of a homicide victim, designed primarily to arouse the passion of the jury, such photographs are admissible when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant.

11. Where not acting in bad faith the State elicits otherwise prejudicial testimony in direct examination, and defense counsel interposes no objection, request for admonishment or time motion for mistrial, but then proceeds to equally develop the area of prejudice in cross-examination, the error is waived and not preserved for review on appeal. Defense counsel has the duty to raise at the proper time all objections to the proceedings, and when this is not done they will be treated as waived, unless they are of such a nature as to deny defendant a fair and impartial trial.

12. The death penalty is not cruel and unusual punishment per se, nor is the scheme for enforcement of capital punishment within this State, as construed, so permeated with unbridled discretion that imposition thereof would constitute invidious discrimination and therefore cruel and unusual punishment.

13. The Legislative purpose in classifying certain "felony-murders" as first degree rather then second degree murder was to deter, with the death penalty, those crimes of a particularly heinous and brutal nature as well as those felonies necessarily involving great risk of death or serious bodily injury to the victim. Armed robbery, as well as the attempt to commit the same, is a felony which has traditionally been recognized as being of such a nature that the ultimate penalty of death should be authorized. The statutory classification as first degree murder, of the unlawful and premeditated perpetration of homicide while committing or attempting to commit armed robbery, constitutes a legitimate and reasonable exercise of police power by the Legislature, and is not so arbitrary, discriminatory and vague that enforcement of the death penalty would deny equal protection and due process of the law.

14. A new trial should not be granted upon the ground of newly discovered evidence where the same is merely cumulative. It must appear that, if the newly discovered evidence had been introduced in the trial, there is a reasonable probability that a different result would have been reached. The practice of granting new trials upon affidavits of persons who have been convicted and then changed their testimony, asserting that they had committed perjury, is not looked upon with favor by the courts. Where at trial one defendant testifies to his innocence and offers testimony exculpating his co-defendant, and after conviction makes an affidavit assuming sole responsibility for the crime, a motion for new trial should not be granted the co-defendant where the affidavit is essentially cumulative to the exculpatory testimony previously extended to the co-defendant and the alibi proof offered by the latter, and testimony consistent with that affidavit would be so far impeachable with prior inconsistent statements that in view of the sufficiency of the evidence there is no reasonable probability a different result would follow upon retrial.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BOBBY JOE WILLIAMS, and ALLEN CLAYBURN JUSTUS, Appellants,	)	
-vs-	)	No. F-74-648 and No. F-74-650
THE STATE OF OKLAHOMA, Appellee.	)	

- O P I N I O N -

BUSSEY, Judge:

Appellants, Bobby Joe Williams and Allen Clayburn Justus, hereinafter referred to as defendants, were charged, tried and convicted in the District Court, Oklahoma County, Case No. CRF-73-3181, for the offense of First Degree Murder, in violation of 21 O.S.Supp. 1974, § 701.1, ¶2. In accordance with the provisions of 21 O.S.Supp. 1974, § 701.3, the defendants were thereafter sentenced to suffer death, and from each judgment and sentence a timely appeal was perfected to this Court in respective Case Nos. F-74-648 and F-74-650, which have been consolidated for review.

At the trial, Adam Knight, a Detective with the Oklahoma City Police Department, testified that at about 4:30 a.m. on October 30, 1973, he was dispatched to an all night convenience store known as Tom's Market at 1501 South Pennsylvania in Oklahoma City, Oklahoma County, Oklahoma. He there observed the dead body of a white female lying in a prone position behind the counter, and also noted that the cash register was open and empty of money. He later learned the name of the deceased to be Cherry Lee Kennedy, and State's Exhibit No. 3 was admitted after being identified as a picture of the deceased as first observed by the witness. When later recalled, the witness testified he was present that same day when Dr. Keen of the Medical Examiner's Office performed an autopsy upon the body and removed a projectile which was released to Officer Connelly. When later recalled a second time, he further testified that he participated in the arrest

of defendant Williams on November 2, 1973, and State's Exhibit No. 2A was admitted into evidence upon being identified as a statement which that defendant gave and executed regarding the alleged offense after being advised of his rights on November 5, 1973. The most pertinent part of that statement was read to the jury as follows:

> "Question: Would you relate to me in your own words to your part in the above homicide?
>
> "Answer: Allan Justus and I was sitting by the Fina Service Station by S.W. 59th and High. I was going to go in there masked and rob him. But there was too much traffic. So we decided not to do it. We were on our way back home and I remembered a store that could be hit. While we were on our way we was talking about it. Allan said that killing someone was the easiest thing in the world to do and get away with it.
>
> "He said if I was to go in the store unmasked that no one would suspect it was being robbed. No one would ever know about it because there wouldn't be any witnesses. We stopped at the store, I went in, told her to put the money in the sack, she did so and I was grabbing some cigarettes with one hand and had the gun in my left hand, when I was trying to put the Marlboro cigarettes in my left hand and the gun in my right hand, the gun accidentally went off. I think it shot her and after that I just started shooting her until it wouldn't shoot anymore and ran back to the car, we started going down deadend streets and I threw the gun outside the car and we went home.
>
> "Question: Bobby, how much money taken in the above robbery?
>
> "Answer: I believe about $30." (Tr. 392-393)

Harrison H. Latham identified State's Exhibit No. 4 as a .22 caliber revolver that he sold to defendant Williams for $20.00 at a swap shop on October 20, 1973. He further testified that he had previously purchased the gun from one Elmer Dempsey, and had not registered the gun with the Oklahoma City Police Department.

William Embery identified State's Exhibit No. 4 as the gun he found on the evening of October 30, 1973, in the 2200 block of South Brookline. He then took the gun home nearby, and his father contacted the police who came and took the gun.

Kenneth James Hahn, a supervisor for Tom's Market, Inc., testified that on October 30, 1973, Cherry Lee Kennedy had operated the store in the 1500 block of South Pennsylvania since 11:00 p.m. the previous evening. He arrived at the store at about 5:30 a.m. that day and observed her body behind the counter before being removed, and a large amount of

blood on the floor. He also noticed the cash register was empty and determined that about $32.00 was missing.

Sergeant Doyal Connelly of the Oklahoma City Police Department testified that he received a bullet from Dr. Phillip Keen and delivered it to Ray Lambert of the Oklahoma State Bureau of Investigation on October 30, 1973.

Ray Lambert of the Oklahoma State Bureau of Investigation appeared as a firearms and ballistics expert. He identified State's Exhibit No. 4 as a gun he had received from Officer Kirby, and testified to receiving a spent bullet from Officer Connelly on October 30, 1973. He then expressed the opinion that based upon his examination this bullet had been fired from State's Exhibit No. 4. When later recalled, this witness identified State's Exhibit No. 5 as containing both the bullet previously mentioned and the bullet that he had test fired from State's Exhibit No. 4 for use in microscopic comparison.

Officer Denver Kirby of the Oklahoma City Police Department identified State's Exhibit No. 4 as the gun he had received from Sergeant Upchurch of that same department, and delivered to Ray Lambert of the Oklahoma State Bureau of Investigation on or about October 31, 1973.

Officer Ron McKinney of the Oklahoma City Police Department identified State's Exhibit No. 4 as the gun delivered to him by William Embery on the afternoon of October 30, 1973, and which he shortly thereafter released to John Hill, a lab technician with the Police Department.

Officer John G. Hill of the Oklahoma City Police Department identified State's Exhibit No. 4 as the gun he had received from Officer McKinney on October 30, 1973. After processing the gun and determining the registered owner to be one Elmer Dempsey, the witness secured the exhibit in a locked cabinet at the Police Department. The gun was then admitted into evidence.

Dr. Phillip Keen, a Medical Examiner and forensic pathologist with the Office of the Chief Medical Examiner for the State of Oklahoma, testified that he performed an autopsy upon the body of Cherry Lee Kennedy on October 30, 1973, and determined the cause of death to be a

gunshot wound to the head. The witness observed a bullet wound to the left leg, another at the top of the head in the right temple, and a third to the left shoulder which then entered the left cheek and lodged behind the right jaw. The latter bullet was recovered and released to Officer Connelly of the Oklahoma City Police Department. State's Exhibit No. 5 was then admitted into evidence.

Officer Bob J. Coffia, assigned to the Special Services Division of the Oklahoma City Police Department, testified that he was trained in the use of video tape equipment, and identified State's Exhibit No. 1 as a video tape portraying an interrogation of defendant Justus which he made at the Oklahoma City Police Department on November 3, 1973. This video tape was then admitted into evidence and exhibited to the jury.

In this video tape statement defendant Justus was first advised of his rights and then acknowledged the same by executing a waiver of rights form. Regarding the subject offense, he then related that at about 3:30 to 3:45 a.m. on the night thereof, he and defendant Williams were riding around in the car of defendant Justus looking for someone, or something, to hit when his co-defendant directed him to Tom's Market. He did not personally favor this location, but defendant Williams was familiar with the store and had observed quite a bit of money there. He parked the car on the north side of the store with the engine running and defendant Williams entered the store with a gun and wearing gloves. While in the car, he heard four shots, and interjected that there were not supposed to be any shots fired but only a robbery. Defendant Williams then came running out with two cartons of Marlboro cigarettes and a bag of money, and said that he had shot her once in the hip and three times in the face and he was sure she was dead. While fleeing the neighborhood in his car, they then kept running into deadend streets. Defendant Williams asked him what should be done with the gun, and upon his advice defendant Williams then wiped the gun and threw it from the car while he was watching the road and looking for police cars. They then drove home and evenly split the money, estimated at $32.00 plus some change, and each took one of the two cartons of cigarettes. When

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arrested, each defendant had one package of Marlboro cigarettes, and he stated that these came from those cartons taken in the robbery. Defendant Justus further described and identified the gun used in the robbery, and explained that he had recommended the gun to defendant Williams when his co-defendant purchased it at a swap meet, and that he thereafter fired the gun in target practice.

The final witness in chief for the State was Detective Jerry Guinn of the Oklahoma City Police Department who testified that he also participated in the arrest of both defendants on November 2, 1973, and thereafter interrogated defendant Justus after advising him of his rights in the video tape marked as State's Exhibit No. 1, during which that defendant identified State's Exhibit No. 4 as the gun therein discussed.

Defendant Williams next took the witness stand in his own defense. Insofar as his testimony was responsive to the evidence of the State and the issues presented, he admitted to having purchased the subject gun but claimed to have traded it to one Alton Oliver (Cooper) on October 28 or 29. He also denied any participation in the crime and any knowledge thereof, and asserted that the confession was signed after he had previously requested an attorney and without knowledge of the contents thereof because Detective Knight threatened to rearrest Gayle Kimbrough, the woman with whom this defendant had been living, and because Detective Knight had indicated that he would protect her from friends of defendant Justus if he would sign the instrument. He explained that Gayle Kimbrough was seven months pregnant and had been taken into custody in connection with this offense on the same night that he had previously been arrested, and claimed that she had been mistreated by the officers calling her names and telling her that the baby would be born in jail. Although he knew that signing the instrument would involve him in the crime, he testified that at the time he did not know this to be a confession, and the contents thereof were not his statements. He further testified that shortly before defendant Justus made his video tape statement on November 3, he gave a video tape statement implicating defendant Justus because the authorities told him that they would release himself and Gayle Kimbrough, and an Assistant District Attorney gave him a piece of paper

wherein he expressed his agreement not to prosecute him for purchasing a gun as a felon if he would testify against defendant Justus. He also admitted prior convictions for embezzlement and a Federal stolen automobile charge.

In cross-examination by the State, defendant Williams testified that Gayle Kimbrough was legally married, and that her husband was in the military service overseas. He claimed that at the time of the crime he was at home with Gayle Kimbrough and her children, and that he had given the piece of paper he had received from the Assistant District Attorney to Gayle Kimbrough or her mother at the police station. He admitted telling Detective Knight that he knew the crime was going to happen, but said that this had been a lie. He also testified that defendant Justus was with him when the gun was purchased and had commented that it was a good gun. In cross-examination on behalf of defendant Justus, he testified that he had implicated that defendant because Detective Knight wanted him to and that to his knowledge defendant Justus had not been involved in the offense.

Ed McConnel, an attorney, next testified that at the request of the sister of defendant Williams he consulted with him in jail on the evening of November 5, 1973, and found the defendant to be quite distraught and unresponsive.

Gayle Kimbrough then testified and insofar as pertinent here generally confirmed her relationship with defendant Williams and his account of the circumstances surrounding her arrest and detention.

Patricia Choate testified as the final defense witness for defendant Williams that she was the mother of Gayle Kimbrough, and that while at the Oklahoma City Police Department defendant Williams gave her a piece of paper signed by the Assistant District Attorney. She had not looked for the paper, but thought that it was at home.

Defendant Justus next testified in his own behalf that he was threatened and coerced into making the video tape confession after being coached and while under the influence of LSD. He denied any participation in the crime, and asserted that he was home with his wife and son at the time of the offense. This defendant explained

that he had taken one hit or pill of LSD shortly before his arrest, and swallowed the remaining eight pills just prior to his arrest to keep from being caught with them. Despite his repeated requests for an attorney, he was thereafter questioned several times. After viewing a video tape statement made by defendant Williams and while still under the influence of the LSD, he agreed to give his video tape confession after Detective Knight had threatened him with a gun and repeatedly prepared him as to what to say. He admitted being with defendant Williams when the gun was purchased, but prior to his arrest claimed to have last seen the gun when defendant Williams gave it to Alton Oliver. He also admitted prior convictions for second degree forgery, attempted larceny of an automobile, and a Dyer Act violation when a juvenile.

Jimmy Justus next testified that he was the father of defendant Justus, and that in response to a telephone call from Detective Knight he visited his son at the Police Department after midnight on the day of his arrest. He described his son as then being "real glassy-eyed, and his speech was rather slow at times, and he would roll his eyes back in his head every once in awhile." (Tr. 554) He further testified that Detective Knight told him a murder had been committed and, although they did not believe his son was involved, they wanted him to use his influence with his son to determine what knowledge he might have of the matter.

Barbara Justus then testified as the final defense witness that she was the wife of defendant Justus and confirmed that he was home with her at the time of the crime. She had also been arrested as an accessory to the murder on the same day that her husband was arrested, and when she first talked with him at the Police Department he told her that they did not have to say anything because he had already asked for a lawyer. On further examination she testified that the next day she verified a statement that her husband had made implicating himself in the crime, but that she had lied because her husband had begged her to verify his statement stating that he had been threatened and if she didn't he would not make it out of the City Jail.

In rebuttal, Elizabeth Huff, a report clerk for the Oklahoma City Police Department, testified that she prepared the statement of defendant Williams after he was read his rights from that instrument, typing the questions and answers between Detective Knight and that defendant word for word. Defendant Williams was then asked to read the statement and initial the encircled typographical errors, which he did in addition to signing the instrument.

Jerry Guinn was then recalled and testified that after defendant Justus gave his video tape statement his wife was brought in at his request, and that defendant then told her he had made a full and truthful statement and he wanted her to do the same.

Adam Knight was then recalled and testified that he never rehearsed defendant Justus to give a statement nor threatened him with a gun.

Officer Larry Upchurch was then called as the final rebuttal witness and denied the previous assertion of Gayle Kimbrough that he had mistreated her by dragging her about.

The State then rested rebuttal and no evidence in surrebuttal was offered in behalf of the defendants.

In their first assignment of error, each defendant contends that the death sentence cannot be imposed because the jury "was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," in violation of Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and other resulting decisions. This contention is principally based upon the exclusion of Mrs. Angel, however, mention is also made of the challenge against Mr. Hall, and of those empanelled, these were the only two veniremen to be excused because they were opposed to capital punishment. The pertinent voir dire examination of these veniremen is set forth in the Appendix hereto attached.

In the recent case of Justus v. State, Okl.Cr., ___ P.2d ____, F-74-713 (1975), however, this Court held that the applicability of Witherspoon was limited to those cases where, upon conviction for the

offense charged, the jury has discretion to resolve whether the defendant shall suffer death or some lesser degree of punishment, and under the provisions of 21 O.S.Supp. 1974, § 701.1, et seq., see infra, we observed that:

> ". . . The people have, through the Legislature, predetermined that such offenses are proper cases for the exclusive assessment of capital punishment, and the pertinent vior dire inquiry is whether in view thereof, the veniremen can deliberate upon the evidence impartially under the law and assess such punishment should guilt be established beyond a reasonable doubt."

Pursuant to the provisions of 22 O.S. 1971, §§ 659, ¶2 and 660, ¶8, we further held in Justus that the appropriate basis for challenge may be for implied bias or actual bias to the extent that the personal scruples or opinions of a veniremen will not yield to the law as enacted by the Legislature. Clearly, the examination of Mr. Hall established that he was so opposed to capital punishment that he could not, in any case, agree to a verdict imposing the death penalty, irrespective of the law and even assuming the State were to prove the defendant guilty beyond a reasonable doubt. The examination of Mrs. Angel unquestionably reveals that she had personal reservations concerning the death penalty, and that she vascillated regarding her capacity to set those reservations aside and otherwise be a fair and impartial juror. However, the voir dire of Mrs. Angel in this regard was extensive, and she was not excused until the conclusion became apparent that at best she did not know whether she could apply the law to the evidence and honor the oath of a juror in this case. We, therefore, find this proposition to be without merit, and in support thereof adopt the following language from Justus:

> "We are of the opinion that a challenge for cause is appropriate to the extent that the veniremen is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror. . . . Clearly, no prospective juror with animosity concerning the death penalty should be excused upon this basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if satisfied of the defendant's guilt beyond a reasonable doubt, a veniremen is unresolved as to whether he could then assess the death penalty, or knowing the death penalty to be mandatory upon conviction, he is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence,

> then he has to that extent forewarned the court that he is undecided whether he could comply with the oath of a juror. A challenge for cause should be granted against such a venireman, for otherwise the administration of the oath would be frivolous. We agree with the cogent argument of the State that the trial court should not accept a juror who does not know whether he can follow the law, and that to do otherwise would create chaos and make our system of jurisprudence a mockery based upon the personal whims of individuals. The State, as well as the defendant, is entitled to a fair and impartial jury. . . ."

Defendant Williams next raises six assignments of error, numbered two through seven, not presented by the Brief of defendant Justus. In his second assignment of error, defendant Williams contends that his confession, State's Exhibit No. 2A, was improperly admitted into evidence because the trial court failed to adequately determine and rule upon the voluntariness thereof, and the evidence presented to the trial court established the same to have been executed involuntarily under coercion.

Following the empanelling of the jury and prior to the opening statement of the State, the trial court conducted an evidentiary hearing, outside the presence of the jury, regarding the admissibility of the confession of each defendant. In regard to the confession of defendant Williams, Detective Knight testified that defendant Williams was arrested at about 4:30 p.m. on a Friday, and executed State's Exhibit No. 2 at about 6:30 p.m. the following Monday after the subject charges were filed earlier that day. He further testified that this interview was initiated at the request of that defendant, and, after being advised of his rights as contained in that exhibit and reading them himself, the defendant gave that statement which was transcribed by a stenographer and signed by the defendant. During this four-day period, Detective Knight explained that defendant Williams was interrogated a total of four times, but that these concerned several other offenses and very little time dealt with the subject offense. Defendant Williams then testified essentially as above set forth with regard to this confession. Marie Drayson, mother of defendant Williams, testified as the final witness that her son telephoned her on the day of his arrest and advised her that he was in custody charged with murder, but did not request that

she get him a lawyer, and that when she then telephoned the jail she was refused permission to see her son. After ordering the deletion of the reference to another and distinct offense, and permitting the substitution of State's Exhibit No. 2A for State's Exhibit No. 2, as so modified, the trial court then overruled a Motion to Suppress the confession wherein defendant Williams asserted that he had not knowingly voluntarily, and intelligently made the same with the benefit of his Miranda rights. In so ruling, the trial court stated in part:

> "THE COURT: I will take up State's Exhibit No. 2 to start with. It's a purportedly signed confession of the Defendant Williams. It is my understanding of the law that the question is: Was it voluntary? And No. 2: Was it given after being admonished of their rights in the Miranda decision of the United States Supreme Court? Now, we have one testimony of the officer and the instrument itself, was that they did advise him, that he was advised. And that he signed it freely, and voluntarily after the Miranda warning that he testified that he gave to the Defendant, in the face of the statement itself said he was advised, plus the fact that Defendant Williams said himself that he signed the statement.
>
> "From the Defendant's point of view of this statement, they say it was not voluntary, that he did not read it, he didn't understand it, he didn't know what he was signing, that he had signed it to keep this lady, his common-law wife, and fiance, out of jail, . . .
>
> ". . . He has testified that he didn't understand it, it was against his will, and so forth. I think that makes it a question of fact for the Jury to decide: The voluntary statement, whether it's voluntary or not. I don't find under the evidence in this case that as a matter of law, that it is unvoluntary (sic) statement. [Emphasis added]
>
> "You have a conflict between the statement itself, testimony of the officer, and the testimony of the Defendant. So I will leave tha up to the Jury to decide as to whether or not under proper instructions, whether it's voluntary.
>
> "If the Jury finds that the statement is not voluntary, then they will be instructed to disregard it. If they do, under the law as you gentlemen know, they can consider it. But I think you have a question of fact to be determined by the Jury, not by the Court. . . ." (Tr. 308-310)

Regarding the sufficiency of the ruling by the trial court, the defendant relies upon Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). However, that decision was analyzed in this regard in Tice v. State, Okl.Cr., 478 P.2d 916, 919-920 (1971), as follows:

> "[T]he crux of these arguments poses the question of whether the hearing and judge's ruling were in accordance with the requirements of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908.

"In Jackson, supra, we find the following pertinent language in Footnote 8, referring to the Massachusetts rule, which has long been followed by the courts of this state:

"'We raise no question here concerning the Massachusetts procedure. In jurisdictions following this rule, the judge hears the confession evidence, himself resolves evidentiary conflicts and gives his own answer to coercion issue, rejecting confessions he deems involuntary and admitting only those he believes voluntary. It is only the latter confessions that are heard by the jury, which may then, under this procedure, disagree with the judge, find the confession involuntary and ignore it. Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant. While no more will be known about the views of the jury than under the New York rule, the jury does not hear all confessions where there is a fair question of voluntariness, but only those which a judge actually and independently determines to be voluntary, based upon all of the evidence. The judge's consideration of voluntariness is carried out separate and aside from issues of the reliability of the confession and the guilt or innocence of the accused and without regard to the fact the issue may again be raised before the jury if decided against the defendant. The record will show the judge's conclusions in this regard and his findings upon the underlying facts may be express or ascertainable from the record.' [Emphasis added].

* * *

"In the instant case a hearing was conducted outside the presence of the jury at which conflicting evidence was offered and while the trial court did not set forth his ruling as to the voluntary nature of the confession in precise language, it is readily apparent in overruling the Motion to Suppress that he considered the confession voluntary and admissible and as such was a proper matter for the jury's consideration under the prior decisions of this Court. See Brewer v. State, Okl.Cr., 414 P.2d 559." (Footnote omitted)

Although the trial court here could have more distinctly expressed his independent determination that the confession was voluntary, in view of the grounds upon which the Motion to Suppress was urged, we are of the opinion that the conclusion of the trial court in this regard is clearly ascertainable from the record. We reach this conclusion on the evidence adduced during the in camera hearing, coupled with the judge's affirmative statement: "I don't find under the evidence in this case that as a matter of law, that it is unvoluntary [sic] statement."

With regard to the sufficiency of the evidence presented at the above hearing, defendant Williams does not content that he was inadquately advised of his rights or failed to comprehend the same, but argues that he was subjected to repeated questioning over long hours while in custody and coerced to execute the confession on threat of Gayle Kimbrough

being rearrested. In support of this argument, he cites Brown v. State, Okl.Cr., 384 P.2d 54 (1963). However, that case is readily distinguishable as the proof there was clear and uncontroverted that the accused had been subjected to severe beatings. Neither the evidence adduced at this hearing, nor the record as a whole, supports the contention that this defendant was subjected to repeated questioning over long hours. He was not actually incarcerated until outside regular court hours on Friday, November 2, 1973. These charges were thereafter filed and a warrant issued on the first day the court was regularly open the following Monday, and the confession was executed that evening. The defendant then had his initial appearance before the trial court the following day. In Fred v. State, Okl.Cr., 531 P.2d 1038, 1046 (1975), this Court stated:

> "[M]ere delay in arraignment of a prisoner will not render the statement or confession involuntary, nor inadmissible, if it is otherwise shown to be voluntary and given without coercion, fear produced by threats or mistreatment, or promises . . ."

Regarding the contention that the confession was coerced, we observe that the instrument itself recites that the statement was voluntarily made and initiated by that defendant, and find that the evidence was clearly sufficient to support the ruling of the trial court. As stated in Castleberry v. State, Okl.Cr., 522 P.2d 257, 269 (1974), we have repeatedly held:

> ". . . This Court will not disturb the trial court's ruling permitting the introduction of a confession if supported by sufficient evidence that the defendant knowingly and intelligently waived his rights and understood the consequences of said waiver. Warren v. State, Okl.Cr., 495 P.2d 837."

In his third assignment of error, defendant Williams asserts as error the refusal of the trial court to admit into evidence the video tape statement he gave on November 3, 1973, wherein he exonerated himself from involvement in the subject offense and attributed the commission thereof to defendant Justus.

The general rule in this regard is set forth in 29 Am.Jur.2d, Evidence, § 535, page 586, as follows:

> "When a confession is admissible, the whole of what the accused said upon the subject at the time of making the

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> confession is admissible and should be taken together; and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy, including any exculpatory or self-serving declarations connected therewith. . . . To be admissible, however, it must clearly appear that the exculpatory statements were made in the same confession or conversation sought to be introduced in evidence, and not upon other or separate occasions. . . ." (Footnotes omitted, emphasis added)

See, Annotation 2 ALR 1017, supplemented at 26 ALR 541. This principle has previously been recognized by this Court. See, Foster v. State, 8 Okl.Cr. 139, 126 P. 835 (1912); Haddock v. State, 64 Okl.Cr. 353, 81 P.2d 339 (1938), and Henson v. State, 97 Okl.Cr. 240, 261 P.2d 916 (1953) However, only to the extent that the self-serving declaration is sufficiently related in both time and subject matter to the confession, is there an adequate guarantee of testimonial trustworthiness to justify admission as an exception to the hearsay rule. This video tape and State's Exhibit No. 2A were here executed under different circumstances on distinct occasions separated by two complete days. We are, therefore, of the opinion that the trial court did not err in refusing admission under the above rule. See, State v. Barnwell, 17 N.C. 299, 194 S.E.2nd 63 (1973), and State v. Thompson, 116 La. 829, 41 So.2d 107 (1906).

In this connection defendant Williams further argues that the video tape statement did not constitute hearsay because this exculpatory statement was not offered to prove the truth of the facts therein asserted but to establish that his subsequent confession was involuntary. However, he cites no authority so holding in this context. The principle in this regard is set forth in 29 Am.Jur.2d, Evidence, § 497, page 555, as follows:

> ". . . The clearest case of hearsay is where a witness testifies to the declarations of another for the purpose of proving the facts asserted by the declarant. The hearsay rule, however, does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is admissible as a verbal act. . . ." (Footnotes omitted)

The record clearly reveals that defense counsel was fully afforded the

opportunity to cross-examine the State's witnesses as to the circumstance surrounding the confession and the extent to which that defendant was previously interrogated. We are of the opinion that, independent of the truth value of the facts therein asserted, the exculpatory statements contained in the video tape, in and of themselves, had no material probative value bearing on the voluntariness of his actions in confessing two days later. Such argument is totally contrary to the authority and rationale upon which the above stated rules are based.

The fourth assignment of error presented by defendant Williams assumes the video tape discussed immediately above to be admissible but for prejudice to defendant Justus, and asserts that a severance should have been granted since his co-defendant objected to the introduction thereof. Since defendant Williams therein exculpated himself and inculpated his co-defendant, the trial court refused to admit this video tape upon the additional grounds that to do so would be fatally violative of defendant Justus' right to confrontation under the purview of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The United States Supreme Court there held that upon joint trial the government's introduction of the confession of a co-defendant also implicating the defendant violated the latter's right of confrontation under the Sixth Amendment to the United States Constitution.

We have already held that the trial court was correct in excluding this video tape as a self-serving hearsay declaration not coming within an exception to that rule. However, assuming arguendo that this statement was otherwise admissible, we further agree with the trial court that the failure of defendant Williams to timely request a severance precluded the introduction thereof, since defendant Justus would thereby have been denied the right of cross-examination on a statement purely inculpatory as to him alone. The introduction of the tape would have been particularly flagrant here since defendant Williams indicated, in testifying at the evidentiary hearing discussed above, that he had not therein told the truth regarding any involvement of defendant Justus in the subject offense. The record reveals that defense counsel for defendant Williams learned of the existence of this video tape at the prelim-

inary hearing. However, a Motion for Severance was never filed with the trial court, and this matter was not in any manner presented to the trial court until the above evidentiary hearing and after the jury was empanelled. The defendant cites Clark v. State, Okl.Cr., 509 P.2d 1398 (1973), in support of this proposition. However, we there held that a timely defense motion for severance should have been granted since the State sought to introduce a confession prejudicially violative of Bruton. In the present case, defendant Williams sought to introduce, in his own defense, a statement prejudicial to his co-defendant. Neither the State nor the court should be required to anticipate whether one defendant might seek to introduce evidence so prejudicial to a co-defendant that a severance would be necessitated. We are of the clear opinion that in such cases the correct rule is stated in Jones v. State, Okl.Cr., 527 P.2d 169, 174 (1974), as follows:

> ". . . It is this Court's opinion that it must always be the rule that severance must be requested by defense counsel with counsel apprising the trial court of circumstances which may develop which might prejudice other co-defendants. Without such information a judge cannot be presumed to know or can it be considered to appear that prejudice will result from the joinder. . . ."

In passing, we are constrained to observe that under the facts and circumstances here presented, the trial of this case as conducted did not constitute a fatally prejudicial violation of the Bruton rule. Although in his confession defendant Williams indicated that defendant Justus encouraged him to kill the victim, and defendant Justus, in his confession, asserted that there was not supposed to be any shooting, both confessions were otherwise perfectly compatible and not antagonistic to one another. Neither defendant ever objected to the introduction of the confession of the other or moved for a severance upon this basis. Each defendant subsequently took the witness stand and was subjected to cross-examination by his co-defendant, and the trial court instructed that each confession could be considered as competent evidence only as to the confessor and not as to the other defendant. See, Davis v. State, Okl.Cr., ___ P.2d ____, F-75-38 (1975) ; Gregor v. State, Okl.Cr., 505 P.2d 519 (1973); Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); Schneble v. Florida, 405 U.S. 427, 92 S.

Ct. 1056, 31 L.Ed.2d 340 (1972), and Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

The fifth assignment of error of defendant Williams asserts that the video tape statement of defendant Justus, State's Exhibit No. 1, should not have been admitted because the State did not establish a sufficient chain of custody and therefore failed to adequately prove that the exhibit had not been altered. This argument is predicated upon the fact that Officer Coffia had maintained custodial possession by storing the tape in a closet at his home when not withdrawn for investigative or prosecutorial purposes. Assuming that under Druton the defendant has standing to raise this issue, despite a limiting instruction that this was competent evidence as against the confessor only, we find this proposition to be wholly without merit. Authenticity was sufficiently established through Officer Coffia, who specifically identified the video tape and testified at the above evidentiary hearing that as presented this exhibit was a true and correct representation of the actual events depicted therein, and that the original tape had not been altered or tampered with in any manner. (Tr. 187-188, 195 and 201-202) See Annotation 60 ALR3rd 333. This specific argument was upon like facts rejected in Paramore v. State, Fla., 229 So.2d 855 (1969), vacated on other grounds, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed. 2d 751 (1972). Also, in upholding the admissibility of a video tape confession in Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972), that Court stated:

> "If a proper foundation is laid for the admission of a video tape by showing that it truly and correctly depicted the events and persons shown, and that it accurately reproduced the defendant's confession, we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. . . ."

Defendant Williams argues, in his sixth assignment of error, that reversible error resulted from the admission of the photograph of the victim, State's Exhibit No. 3, since any probative value was clearly outweighed by the prejudicial and inflammatory nature thereof. We do not agree.

In Pate v. State, Okl.Cr., 361 P.2d 1086 (1961), we again recognized that the introduction of photographs taken subsequent to a homi-

cide is largely within the discretion of the trial court and not a cause for reversal absent an abuse thereof, and have repeatedly applied the principles set forth in the ninth paragraph of the Syllabus thereof, as follows:

> "Although it is error to receive in evidence gruesome photographs of a homicide victim, designed primarily to arouse the passion of the jury, such photographs are admissible; when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant."

Also see, Vavra v. State, Okl.Cr., 509 P.2d 1379 (1973) and Hopkins v. State, Okl.Cr., 506 P.2d 580 (1973), together with case authority collected therein.

Despite the presence of blood, the black and white photograph involved in the present case was not ghastly nor gruesome, but did reflect the condition and location of the body upon being discovered shortly following the crime. This exhibit was corroborative of the confession of each defendant, and of the testimony of the investigating officers and the pathologist. Although the defendant asserts that the body had been moved when the picture was taken, this is mere conjecture not supported by the record. Other police officers arrived at the scene of the crime prior to Detective Knight, but that witness testified that the exhibit accurately portrayed the body as he first observed the victim. We agree with the State that the smeared blood depicted therein may have been caused by the victim's own body movements or extraneous sources not necessitating the conclusion that the body had been moved. We, therefore, hold that the photograph was relevant to the issues before the jury, and that the probative value of the exhibit was not outweighed by the danger of prejudice to the defendant.

The seventh assignment of error of defendant Williams asserts that prejudicial and reversible error occurred in the direct examination by the State of Detective Knight regarding the details of the autopsy. The complained of examination was as follows:

> "Q. Now, Mr. Knight, you saw the doctor, didn't you?
>
> "A. Yes, sir,
>
> "Q. Did you see him take her heart out?
>
> "A. Yes, sir, I did.

"Q. Did you see him remove other organs of her body?

"A. Yes, sir, I did.

"Q. Cut her in many pieces, didn't he?

"A. Yes, sir.

"Q. Was she dead?

"A. Yes, sir." (Tr. 374-375)

This proposition is also without merit, however, for the reason that no objection was made to this testimony, and for the further reason that defense counsel for the defendant Williams, himself, equally inquired into this area, thereby waiving any error introduced by the State. Although needlessly and imperfectly done, the record reveals that the apparent purpose of the prosecutor in pursuing this line of interrogation was to establish that the victim was dead and thereby an element of the corpus delicti as a predicate for admissibility of the confessions. No objection, request for admonishment, or Motion for Mistrial, was interposed at the time of this examination, rather, immediately following that examination defense counsel for defendant Williams cross-examined this witness as follows:

"Q. Now then. You stated to Mr. Harris that the doctor took her heart out?

"A. Yes, sir.

"Q. Did he find a bullet in it?

"A. No, sir.

"Q. Did he tell you that was the heart?

"A. Sir, I have seen numerous autopsies.

* * *

"Q. Then did you cut what you saw him take out?

"A. Did I personally do this?

"Q. Put it in your hand and examine it?

"A. No, sir." (Tr. 375-376)

Not until further trial proceedings the next day did defendant Williams move for a mistrial claiming prejudice upon this basis. The general rule in this regard is set forth in paragraph three of the Syllabus of Love v. State, Okl.Cr., 360 P.2d 954 (1960), as follows:

"It is the duty of counsel to raise at the proper time all objections to the proceedings . . . and when this is not

done, they will be treated as waived unless they are of such a nature as to deny defendant a fair and impartial trial."

In this appeal the defendants additionally have the very able assistance of briefs filed Amicus Curiae in opposition to capital punishment by attorneys for both the American Civil Liberties Union of Oklahoma and the NAACP Legal Defense and Educational Fund, Inc., with leave of this Court. Considering all the briefs together, we are urged to hold the death sentences herein unconstitutional for any one of the following reasons:

1. The death penalty is cruel and unusual punishment per se;

2. The scheme for enforcement of capital punishment within this State is so permeated with unbridled discretion that imposition of the death penalty would constitute invidious discrimination and therefore cruel and unusual punishment;

3. The statutory classification of capital offenses in this State is so discriminatory, arbitrary, and vague that their enforcement would deny equal protection and due process of law.

In the consolidated cases of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), hereinafter cited by reference to the lead case, the United States Supreme Court rendered a per curiam opinion stating that:

". . . The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (408 U.S. 239)

A majority of that court could not agree upon a more specific statement of law for future application. Each of the nine members of the court wrote separate opinions, with five justices joining in the per curiam decision, and four dissenting therefrom. Only two members of the majority concluded that the death penalty was cruel and unusual punishment per se, while the remaining three were of the opinion that death sentences imposed under statutes permitting the imposition of that penalty or a lesser punishment at the unbridled discretion of the judge or jury resulted in invidious discrimination and therefore constituted cruel and unusual punishment. That decision was recognized and followed within this jurisdiction, and resulted in numerous death sentences so imposed being modified to life imprisonment. See, Pate v. State, Okl.Cr., 507 P.2d 915 (1973).

Clearly, Furman does not stand for the proposition that the

death penalty is cruel and unusual punishment per se. Contrary to the contention that capital punishment is incompatible with contemporary standards of decency, we observe that thirty-two states and the federal government have enacted capital punishment statutes responsive to Furman and by a two-to-one margin the voters in California adopted a State constitutional amendment providing for capital punishment following State court action which held the death penalty to be violative of the State constitution. See: 17 Criminal Law Reporter 4030, containing a summary of the April 23, 1975, oral argument before the United States Supreme Court on the issue of the constitutionality of capital punishment in the pending case of State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), pet. for cert. to S.Ct. of N.C. granted, 95 S.Ct. 223, 42 L.Ed.2d 177 (No. 73-7031, Oct. 29, 1974); and, Act 29, House Bill number 150, Vernon's Missouri Legislative Service, page 79 (1975), approved subsequent thereto on June 23, 1975. This Court has previously held that the death penalty is not cruel and unusual punishment per se, and now re-affirms the following language from Fesmire v. State, Okl.Cr., 456 P.2d 573, 587 (1969), death sentence modified pursuant to Furman, 408 U.S. 935, 92 S.Ct. 2855, 33 L.Ed.2d 749 (1972), 502 P.2d 1048 (1972).

> ". . . Although the comparative merits of capital punishment have been presented in arguments before this Court many times, and the proponents of its abolition have argued its moral, legal, and social implications, neither this Court, nor as yet the Supreme Court of the United States, has seen fit to classify the imposition of capital punishment as being cruel and unusual and therefore in violation of the Constitution of the United States."

Effective May 17, 1973, the Oklahoma Legislature repealed capital punishment provisions for Murder such as those under which death sentences were held to be unconstitutional in Furman, and enacted 21 O.S. Supp.1974, § 701.1, et seq., in an effort to comply with the mandate of that case. The defendants were here convicted under the provisions of § 701.1, which insofar as pertinent provides:

> "Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:
>
> * * *
>
> "2. When perpetrated by one committing or attempting to com-

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mit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;"

Each defendant was thereafter sentenced in accordance with § 701.3, providing in part:

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. . . ."

Although many of the other states responding to Furman with new capital punishment enactments have not deemed the total abolition of sentencing discretion to be necessary, the above statutory provisions clearly eliminate sentencing discretion for the crime of First Degree Murder within this State and are representative of the extreme approach necessary to curb the unfettered sentencing discretion condemned in that case. See Comment, Discretion and the Constitutionalty of the New Death Penalty Statutes, 87 Harv.L.Rev. 1690 (1974). We are, however, urged that prohibitive discretion remains within the scheme for enforcement of capital punishment in this State. Specifically, the argument is made that unbridled discretion persists in the following respects: The prosecutor may decide what charge, if any, to file and pursue and negotiate in behalf of the State for a plea of guilty to a reduced offense; the judge or jury trying the case may find the defendant guilty of a lesser included offense; this Court may modify the death sentence to life imprisonment; and, the Governor may exercise executive clemency in granting commutations and pardons. The contention is also made that the jury may find the accused guilty of First Degree Murder but refuse to affirmatively state in their verdict that the defendant shall suffer death as called for in 21 O.S.Supp.1974, § 701.3, supra. However, as to this latter contention we need only observe that the introductory sentence to that section makes the death penalty mandatory upon conviction, and direct attention to 22 O.S. 1971, § 927, which provides:

"Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly."

The briefs filed amicus curiae cite Commonwealth v. A Juvenile, Mass., 300 N.E.2d 439 (1973), in support of the proposition that Furman extends to any discretionary imposition of the death penalty at all levels. In that case the court held that Furman prohibited imposition of the death penalty upon a juvenile under statutory provisions whereby even upon conviction as an adult the trial judge could within his discretion either sentence the accused to death, or eliminate the possibility of capital punishment by adjudicating him to be a delinquent child despite prior judicial determination that he should be prosecuted as an adult. Like Furman, this case deals with sentencing discretion by the judge or jury upon conviction, and does not stand for the proposition that a juvenile cannot be certified for prosecution as an adult on otherwise valid capital punishment provisions. As so construed, that case is perfectly in align with Furman.

Since the decision in Furman, this argument has, in whole or part, been presented to the highest court of at least six states, and to the extent offered has been consistently rejected. Thus, in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721, 741 and 743 (1974), that court reasoned in part as follows:

"The arguments of the defendant and of the amicus curiae . . . may be summarized as follows: . . . Although . . . the imposition of the death sentence [is] mandatory upon conviction of first degree murder or rape, the death penalty is nevertheless discretionary and selective because (a) the Solicitor has the power to prosecute for a lesser charge, (b) the jury has the power to acquit or to convict of a lesser charge, and (c) the Governor has the power to commute the sentence or grant a pardon; . . .

* * *

"The Equal Protection Clause of the Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment. The Due Process Clause of that amendment protects liberty as well as life. The discretion in the Solicitor, in the jury and in the Governor, of which the amicus curiae complains, extends also to non-capital cases. If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, however long or short. Quite obviously, this is not the kind of discretion which the Supreme Court of the United States held impermissible in Furman v. Georgia. . . ."

Also, In Jefferson v. Commonwealth, 214 Va. 747, 204 S.E.2d 258, 260-261 (1974), that court refused to extend Furman beyond discretionary sentencing and held:

> "While conceding that death is the only penalty which may be imposed upon conviction of killing a prison guard . . . the defendant argues that 'the statute's operation inevitably requires the exercise of a broad range of uncontrolled selective discretion' by Commonwealth's attorneys and trial judges and that the Governor of Virginia could extend executive clemency. . . .
>
> "The substance of this argument is that a statute imposing the death penalty is constitutionally infirm under Furman where any discretion may be exercised by any authority at any time, either before, during or after trial.
>
> "We do not so construe Furman. The constitional infirmity there was found in fixing punishment, be it by a jury or a judge. Furman's application is thus limited to statutes which permit such discretion to be exercised."

With particular regard to prosecutorial discretion, the court in Jarrette, supra, stated in part as follows:

> ". . . The decision of the Solicitor as to the offense for which he will seek an indictment from the grand jury and his decision as to whether to accept, with the permission of the court, a plea to a lesser charge, included within the offense specified in the indictment returned, are the results of an evaluation of the available evidence, including its credibility. The Solicitor's decision to charge a defendant with a crime, punishable by death if he is convicted, is a solemn one, properly reached only when, in the Solicitor's judgment, the evidence of guilt is clear and convincing. This is a human evaluation. There is often room for difference of opinion concerning it. To say, as does the brief of the amicus curiae, that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decisions to seek convictions on capital charges in other cases are 'freakish' is a patent absurdity . . .
>
> "The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in light of what he determines to be materially different factual situations. All governmental actions are based on this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the discretion, now complained of by the amicus curiae, has been vested in prosecuting officers throughout the country. Without it, the greatest injustices would necessarily be inflicted upon innocent persons accused of crime." (202 S.E.2d 741-742)

Additionally, this Court has recently recognized the legislative curtailment of circumstances in which the trial court can, pursuant to plea bargaining, accept a plea of guilty to a lesser included offense

reduced from First Degree Murder in State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965, 971-972 (1975), wherein we stated in part:

> "Since the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, [See 21 O.S.Supp.1974, § 701.3, infra] it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:
>
> "In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State, by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S.Supp. 1974, § 701.3, and render unconstitutional the provisions of 21 O.S.Supp. 1974, § 701.1, under the decisions of the United States Supreme Court in Furman . . .
>
> ". . . Nothing in this opinion shall be construed as precluding the State from granting the defendants in any case, capital or otherwise, immunity from prosecution, so long as the immunity granted conforms to the Constitution and statutes of the State of Oklahoma and the Constitution and statutes of the United States.
>
> "We emphasize that the procedure detailed above, is applicable only to cases wherein the defendant, or defendants, was originally charged with Murder in the First Degree in violation of 21 O.S.Supp. 1974, § 701.1.
>
> "Nothing in this opinion should be construed as prohibiting the trial court from instructing in the manner provided by 21 O.S.Supp. 1974, § 701.3, if the evidence on trial warrants an instruction on a lesser offense."

With regard to instructions on lesser included offenses, 21 O.S. Supp. 1974, § 701.3, provides:

> ". . . In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

The State of Delaware is the only jurisdiction noted to seemingly adopt the view now urged upon us that prohibitive discretion remains where the judge or jury trying the case may find the accused guilty of a lesser included offense. In State v. Sheppard, Del.Supr., 331 A.2d 142

(1975), that court held constitutional a recently enacted statute making capital punishment mandatory for first degree murder, assuming uniform application, and further restated in part the following dictum from State v. Dickerson, Del.Supr. 298 A.2d 761, 769-770 (1972), as follows:

> "'* * * the result reached here does not necessarily solve the problems created by the Furman decision for any state wishing to retain capital punishment. History shows that the mandatory death sentence for first degree murder is also open to caprice and discrimination in the imposition of the death penalty. The jury's route for the exercise of such caprice and discrimination, historically, is to return a verdict for a lesser-included offense carrying a lesser penalty. . . .
>
> "'Obviously, any lack of uniform application - any discrimination or caprice in the imposition of the death sentence via the lesser-included offense route - will expose the mandatory death penalty provision of the Murder Statute, hereby upheld, to the same condemnation as was accorded the Mercy Statute in the Furman case.'" (331 A.2d 144-145)

However, in both State v. Hill, La., 297 S.2d 660 (1974) and State v. Selman, La., 300 S.2d 467 (1974), that court rejected the contention that lesser included or responsive verdicts provided for by statute permitted the jury to exercise uncontrolled discretion prohibited by Furman. In State v. Dixon, Fla., 283 S.2d 1 (1973), that court upheld a capital punishment enactment responsive to Furman, which unlike our statute requires a judge and jury to weigh aggravating and mitigating circumstances before assessing the death penalty. That court reasoned, in part, as follows:

> ". . . The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, . . .; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, . . .
>
> "Discretion and judgment are essential to the judicial process, and are present at all stages of its progression - arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. . . .
>
> "Thus, if the judicial discretion . . . can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, . . . has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest." (283 S.2d 6-7)

Also, in Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974), that court upheld a new capital punishment enactment which required the judge

or jury to first find the presence of one of several prescribed aggravating circumstances before the death penalty could be assessed. In so holding, the court reasoned in part as follows:

> ". . . The U.S. Supreme Court's multiple-opinion decision in Furman and Jackson seems to leave the door ajar, . . . at least to some extent, for new legislation by the States permitting the exercise of some controlled discretion through the use of objective standards by which the sentencing authority may be guided in imposing the penalty of death. The States are free, we must conclude, to provide a new system short of mandatory application, . . .
>
> ". . .The essential question is not whether our new death statute permits the use of some discretion, because admittedly it does, but, rather, whether the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. After all, some discretion is inherent in any system of justice, from arrest to final review. In the same context, for example, the U.S. Supreme Court's 'decision to grant or deny certiorari is by law discretionary and the decision to hear argument on appeal has of necessity also come to depend on an element of discretion.' Goldberg and Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1803. Logically, it is not discretion per se which must be condemned, but it is unguided discretion that does not 'produce evenhanded justice.'" (204 S.E.2d 615-616)

Finally, in Jurek v. State, 522 S.W.2d 934 (Tex.Cr.App., 1975), that court most recently upheld a new capital punishment scheme which requires that the jury unanimously find against the defendant with reference to all three statutorily prescribed aggravating categories before the trial court shall then sentence the accused to death. In so holding, the court reasoned in part as follows:

> "Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. * * * The mere presence of discretion in the sentencing process does not render that procedure violative of Furman. It is rather the quality of discretion and the manner in which it is applied that must be controlled. To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence. If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman will be met." (at page 940, footnote omitted)

This Court indicated that 21 O.S.Supp.1974, § 701.3, should be strictly construed to permit lesser included instructions only where clearly appropriate in Murray v. State, Okl.Cr., 528 P.2d 739 (1974), wherein we held that an instruction upon Second Degree Murder was in-

proper in a First Degree Murder prosecution allegedly perpetrated pursuant to an armed robbery. In accordance therewith, an instruction upon a lesser included offense was not appropriate or given in the present case. However, we are of the opinion that as so construed the approach introduced through this statute is the only satisfactory and lawful manner in which both the interest of the defendant in a fair and impartial trial by jury and the right of the State to fully prosecute may be maintained. To the extent that instructions upon appropriate lesser included offenses are not submitted, the jury would not have the opportunity to consider whether the defendant might only be guilty of a less serious crime, and he would thereby effectively be deprived of his right to a full and complete trial by jury. Also, since jeopardy would attach to further prosecution upon any offense necessarily included within that charged, in the selection or election of charges, the prosecutor would be required to speculate upon what evidence the jury might ultimately believe.

As to appellate review, 21 O.S.Supp. 1974, §§ 701.5 and 701.6, respectively, provide:

> "The Court of Criminal Appeals when reviewing a judgment and sentence of death shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are not errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> "Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the penitentiary at hard labor."

In our Interim Opinion herein, we rejected the contention that 21 O.S.Supp. 1974, §§ 701.5 and 701.6, introduce or perpetuate another discretionary level in an already discretionary riddled system. Pursuant thereto the evidentiary hearing contemplated therein was assigned and

heard for the purpose of determining whether the sentence of death was the result of discrimination or substantially disproportionate to the penalty imposed in similar cases, and thereby violative of principles of due process and equal protection of the law. No evidence was offered by either the defendants or the State upon that hearing. Rather, shortly prior thereto each defendant filed a motion requesting that this Court establish guidelines for the review of death sentences under those statutory provisions, and each party hereto candidly indicated that without such guidelines these statutes were so vague and uncertain that they were unaware as to how to proceed.

We are now of the opinion that 21 O.S.Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court thereafter fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, § 953. See also, Rule 2.12, 22 O.S.Supp 1974, Ch. 18, App. Nothing in this opinion shall preclude the defendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S. 1971, § 1080, et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense which the Legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the

statutory provisions governing the particular crime charged. See, Brown v. State, Okl.Cr., 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First Degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases. Those cases under the mercy statutes which preceded 21 O.S.Supp. 1974, § 701.1, et seq., are now irrevelant insofar as the assessment of punishment is concerned. Of course, any discriminatory application of the current capital punishment provisions could be presented as a violation of a defendant's right to equal protection of the law. The unconstitutionality, however, of 21 O.S.Supp. 1974, §§ 701.5 and 701.6, do not render the remaining provisions of that Act unconstitutional since those provisions were enacted with a severability clause attached. See, House Bill No. 1101, Oklahoma Session Laws 1973, Chapter 216, pages 249-252.

Article VI, § 10, of the Oklahoma Constitution grants the Governor authority to commute or pardon those convicted of capital offenses upon a favorable recommendation by a majority of the Pardon and Parole Board. We cannot agree that such a system of executive review must, as such, introduce invidious discrimination. In this regard we join the court in Jarrette, supra, in reasoning that:

> "It is quite true that . . . the Constitution of North Carolina gives to the Governor of this State the authority to commute a death sentence imposed upon any defendant, or to grant to such defendant an absolute pardon, and to refuse to disturb such sentence imposed upon a different defendant. . . . [T]he Constitution of the United States confers a like power upon the President. So far as we have been able to determine, a like power is vested in the Governor, or some other official of the Executive Department, in each of our states. This power has existed and has been exercised repeatedly by the Governors of every state and by the President of the United States from the birth of our country. If its existence and frequent exercise makes the imposition of the death penalty unconstitutional per se, the nine Justices of the Supreme Court of the United States wasted a great deal of thought and much paper in Furman v. Georgia, . . . None of them so suggested in that case.
>
> ". . . The Governor exercises his judgment after investigation of the record of the trial and other circumstances, including subsequently discovered evidence. This Court reviews the rulings of the trial judge. The Governor reviews the decision of the jury, which we may not do. The exercise

> by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called 'freakish' or 'arbitrary' merely because another Governor might, theoretically, have reached opposite conclusions." (202 S.E.2d 742-743)

We are further fortified in this regard by the language employed by the United States Supreme Court in the post-Furman case of Schick v. Reed, ___ U.S. ____, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974), as follows:

> ". . . [T]his Court has long read the Constitution as authorizing the Presidnet to deal with individual cases by granting conditional pardons. The very essence of the pardoning power is to treat each case individually.
>
> * * *
>
> ". . . Individual acts of clemency inherently call for discriminating choices because no two cases are the same. . . ."

As there recognized by the United States Supreme Court, this was the state of the law at the time of their previous decision in Furman, yet there was no indication in Furman that the power of executive clemency had resulted in the invidious discrimination therein criticized.

We therefore hold that the scheme for enforcement of capital punishment within this State under the provisions of 21 O.S.Supp. 1974, § 701.1, et seq., as construed, does not constitute cruel and unusual punishment and is not violative of the Eighth and Fourteenth Amendments to the United States Constitution as interpreted by the United States Supreme Court in Furman.

We consider next the argument that the statutory classification of capital offenses under which the defendants were convicted is so arbitrary, discriminatory, and vague that enforcement of the death penalty would deny equal protection and due process of the law in violation of the Fourteenth Amendment to the United States Constitution. Among other cases cited in support thereof is Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), wherein the United States Supreme Court held that a statutory scheme providing for the sterilization of habitual criminals was violative of the Equal Protection Clause, as the Act provided for the sterilization of those convicted of such offenses as larceny by theft or fraud, but exempted those convicted of such offenses as embezzlement, crimes which may be distinguished upon

only so subtle a basis as when the felonious intent arose. In so holding, the court there reasoned in part as follows:

> ". . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. . . ." (316 U.S. 541)

However, we further observe that the court there recognized that:

> ". . .Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry.' . . . They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. . . We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing 'degrees of evil' . . . 'the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' . . . Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. . . . For a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining 'its restrictions to those classes of cases where the need is deemed to be clearest.' . . . '[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.'" (316 U.S. 539-540, citations omitted)

Of the various classifications of capital offenses set forth in 21 O.S.Supp. 1974, § 701.1, the defendants were convicted under one of the "felony-murder" categories deemed by the Legislature to be of such a nature that they should be classified as First Degree rather than Second Degree Murder under 21 O.S.Supp. 1974, § 701.2. Although we are urged that each of the ten paragraphs enumerated within the aforementioned statute are upon this basis unconstitutional, as previously observed these provisions were enacted with a severability clause attached, see House Bill No. 1101, supra, and we are therefore of the opinion that the defendants have standing to raise this issue only to the extent that the unlawful and premeditated perpetration of homicide while committing or attempting to commit armed robbery may constitute such a classification.

We are of the opinion that this aspect of the statute cannot seriously be argued to be indefinite or vague, and contrary to the contention that such a classification is arbitrary and discriminatory we find the same to constitute a legitimate and reasonable exercise of

police power by the Legislature. See, Jefferson, supra, where the court rejected the contention that a statute mandating capital punishment upon conviction of a prison inmate for killing a guard was unconstitutional because of the classification of persons to whom applicable. Also, in Finley v. California, 222 U.S. 28, 32 S.Ct. 13, 56 L.Ed. 75 (1911), the United States Supreme Court upheld a state statute mandating the death penalty for those serving a life sentence in a state prison who committed a malicious and felonious assault upon another, and rejected the contention that such an enactment denied the accused the equal protection of the laws and was discriminatory as between him and those convicts serving lesser terms. Prior to Furman, simple armed robbery, as well as the attempt to commit the same, was punishable by death or imprisonment at the discretion of the jury under 21 O.S. 1971, § 801, irrespective of whether homicide resulted in the commission thereof. This was also true of kidnapping for the purpose of extortion and first degree rape under 21 O.S. 1971, §§ 745 and 1115 respectively. These are felonies which have traditionally been recognized as being of such a nature that the ultimate penalty of death should be authorized. Clearly, the Legislative purpose in classifying certain "felony-murders" as first degree rather than second degree murder was to deter, with the death penalty, those crimes of a particularly heinous and brutal nature as well as those felonies necessarily involving great risk of death or serious bodily injury to the victim. Of course, to mandate the death penalty for the underlying felony, irrespective of whether homicide resulted, might well operate to encourage the murder of the victim, since the perpetrator of such felonies could now incur no greater penalty and may thereby better conceal his crime. This Court previously upheld the imposition of the death penalty for simple armed robbery under the above statute in Ellis v. State, 54 Okl.Cr. 295, 19 P.2d 972 (1933); and in Robards v. State, 37 Okl.Cr. 371, 259 P. 166, 167 (1927), we previously recognized that offense to be of an intrinsical distinguishable quality in rejecting the contention that the punishment then provided therefor constituted cruel and unusual punishment as follow

> ". . .[R]obbery by firearms, where resistance of the person sought to be robbed may be expected to result in death or serious bodily injury at the hands of the one engaged in such crime, is of so serious a nature and consequence that we cannot say, as a matter of

> law, that the punishment fixed by the statute makes it cruel or unusual, within the meaning of the Constitution. . . ."

Pursuant to Rule 2.12 B, 22 O.S.Supp. 1974, Ch. 18, App., and subsequent to perfecting this appeal, defendant Justus filed with this Court a Motion for New Trial based upon newly discovered evidence. That Motion was predicated upon an affidavit purportedly executed by his co-defendant, Bobby Joe Williams, wherein the latter admits guilt of the subject offense but further states that he perpetrated the crime alone. Assuming that his co-defendant would so testify upon a retrial, we are of the opinion that such testimony is cumulative and there is no reasonable probability that a different result would follow upon a new trial.

At their joint trial, the State introduced the confession of each of the above defendants, and both confessions were in all essential respects mutually compatible and not antagonistic with regard to the involvement of the other defendant. Both the defendants took the witness stand in their own defense, and testified that the confessions were made under duress and were not their own statements. Defendant Justus introduced the defense of alibi, and was supported therein by the testimony of his wife. Defendant Williams denied any participation in the crime and any knowledge thereof and, in cross-examination by defense counsel for defendant Justus, further testified that he had previously implicated his co-defendant under duress and that he had no knowledge that defendant Justus had been involved in the offense. The only new matter thus presented by this Motion was that defendant Williams assumed sole responsibility for the crime, contrary to his sworn testimony at in camera proceedings before the trial court and in the trial itself, as well as his unsworn confession and a prior statement wherein he inculpated defendant Justus alone.

As set forth in paragraph two of the Syllabus to Williams v. State Okl.Cr., 220 P.2d 836 (1950), this Court has repeatedly held:

> "A new trial should not be granted upon the ground of newly discovered evidence where the same is merely cumulative. It must appear that, if the newly discovered evidence had been introduced in the trial, there is a reasonable probability that a different result would have been reached."

In Wells v. State, 16 Okl.Cr. 461, 184 P. 465 (1919) and Whitworth v. State, 80 Okl.Cr. 239, 158 P.2d 364, reversed on other grounds on rehear

80 Okl.Cr. 239, 159 P.2d 277 (1945), this Court was previously presented with this question under similar circumstances. In Wells we stated that:

> "The defendant filed a motion for a new trial upon the ground, among other grounds, of newly discovered evidence; the newly discovered evidence being contained in an affidavit made by said A. J. Seimen while in jail after his conviction, in which he fully refuted the evidence given by him on the trial of this case, and asserted that he alone, without the knowledge or assistance of the defendant, committed the larceny charged while at the dance, and completely exonerated the defendant from any complicity therein in any manner, and that he (affiant) had not communicated the facts stated in said affidavit to the defendant, or to any one, until after the trial in this case had been had. The court announced that it did not believe the averments of the said affidavit, overruled the motion for a new trial, and the defendant excepted.
>
> * * *
>
> "Seiman on the trial of the case having testified that he had no knowledge of, or connection with the commission of the larceny charged, certainly no evidential weight could be given to the said newly discovered evidence, the averments of his affidavit 'that he alone committed the crime charged, and did so without the knowledge or assistance of the defendant,' and the court did not err in overruling the motion for a new trial." (184 P. 466-467)

Further, in the Syllabus and decision in Whitworth, we stated that:

> "A motion for new trial was made upon grounds of newly discovered evidence, and supported by affidavit of defendant's brother (who was a co-defendant and had been convicted and was serving a sentence in the State penitentiary), that affiant and another committed the crime and that defendant was not present and had no knowledge thereof, affiant having previously testified at the trial of defendant that he had no part in the commission of the crime; Held: that such showing does not entitle the defendant to a new trial as a matter of right, but calls into exercise the sound discretion of the court, and such motion should be overruled unless the trial court believes that such recantation is probably true, and that another trial might result in the acquittal of the defendant.
>
> "The practice of granting new trials upon affidavits of persons who have been convicted and then change their testimony, admitting that they had committed perjury, is not looked upon with favor by the courts.
>
> * * *
>
> ". . . It would be setting a dangerous precedent to permit a defendant to go upon the witness stand and commit perjury by testifying to his innocnece, and that of his co-defendant, and then when convicted make an affidavit admitting his perjury, . . ." (158 P.2d 364 and 368)

The confession of defendant Williams, wherein he also inculpated defendant Justus, was not competent evidence as to the latter, and the jury was so instructed. However, even assuming otherwise, defendant Justus would nevertheless not be entitled to a new trial as a matter of law since there was other evidence clearly sufficient to support the

verdict. In Ryal v. State, 16 Okl.Cr. 266, 182 P. 253 (1919), we held that:

> ". . . An affidavit of a material witness for the state that he perjured himself on the trial of the defendant, . . . [does] not as a matter of right entitle a defendant to a new trial; but the granting of same is a matter of discretion of the trial court, and the court, under such state of the record, should not grant a new trial unless the court, in the exercise of its sound discretion, determines that the recantation of the witness was probably true. . . ."

Also see, Tobler v. State, 87 Okl.Cr. 25, 194 P.2d 202 (1948).

In view of the verdict of the jury and the evidence presented, we are persuaded that defendant Williams' version of the matter has run a full gamut. He first gave a statement implicating defendant Justus alone, he next gave a confession mutually compatible with that of defendant Justus, he then testified at the trial denying any knowledge of the subject offense, and finally, he now asserts that he was solely responsible for the crime. We are of the opinion that the present affidavit of defendant Williams is essentially cumulative to the exculpatory testimony he previously extended to defendant Justus and the alibi proof offered by the latter, and that testimony of defendant Williams consistent with his present affidavit would be so far impeachable with his prior inconsistent statements that in view of the evidence previously presented there is no reasonable probability that a different result would follow upon retrial. Accordingly, on August 1, 1975, this Court by unanimous decision issued an order overruling the aforesaid Motion for New Trial.

Pursuant to Rule 1.11 of this Court, 22 O.S.Supp. 1974, Ch. 18, App., this case was previously assigned and heard for oral argument. We have now carefully reviewed the entire record before this Court, and thoroughly considered the argument and authority presented and have determined that the record is free of any error of law requiring reversal. The judgment and sentence of each defendant is, accordingly, AFFIRMED.

Pursuant to Rule 1.18, 22 O.S.Supp. 1974, Ch. 18, App., the defendant is advised that any Petition for Rehearing herein must be filed with the Clerk of this Court within fifteen (15) days of the date upon which this opinion is filed therein.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE JOE CANNON, JUDGE

BOBBY JOE WILLIAMS and ALLEN CLAYBURN JUSTUS, appellant, were convicted of the offense of First Degree Murder; were sentenced to Death, and appeal. Judgment and sentence AFFIRMED.

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OPINION BY BUSSEY, J.
BRETT, P. J., CONCURS
BLISS, J., CONCURS

APPENDIX

Selected Voir Dire Examination

"THE COURT: . . . This is a first degree murder case, and the penalty for first degree murder under the laws of the State of Oklahoma is that any person who, if convicted of murder in the first degree, shall suffer death.

There are crimes that you may try as a Juror up here where there is a reign of punishment, but in murder in the first degree, the laws of this state is that it is the death penalty. . . .[T]he burden of proof is on the State of Oklahoma to prove a Defendant guilty beyond a reasonable doubt. If the State proves to your satisfaction beyond a reasonable doubt that the Defendants are guilty of murder in the first degree, it would be your duty to find the Defendants guilty of murder in the first degree. Would each of you do that as your sworn duty as Jurors?

If anyone who would not, please hold up your hand?

MRS. ANGEL: That would apply to capital punishment, wouldn't it?

THE COURT: I will get to that in a moment. . . .

As I told you a moment ago, ladies and gentlemen, in this type of case there is only one punishment under the laws of the State of Oklahoma for murder in the first degree, that is that the Defendant or Defendants shall suffer death. And it would be your duty, if you found them guilty beyond a reasonable doubt under the law, in the case to assess the punishment in the case, and there being only one punishment. . . .

* * *

THE COURT: Mrs. Angel, do you understand the nature of the case that is on trial before this Jury today?

MRS. ANGEL: Yes.

THE COURT: Do you understand what I have told you about the punishment for first degree murder is by the laws of this state?

MRS. ANGEL: Yes.

THE COURT: Mrs. Angel, in a case where the law and the evidence warrants, in a proper case, could you without doing violence to your conscience, agree to a verdict imposing the death penalty?

MRS. ANGEL: No, sir.

THE COURT: You couldn't?

MRS. ANGEL: No.

MR. HARRIS: We challenge the Juror for cause.

THE COURT: Juror has been challenged for cause. What says Mr. Leatherman first?

"MR. LEATHERMAN: I don't think that is any cause, Your Honor.

THE COURT: I'll ask the Juror one other question. Mrs. Angel, I take it you have reservation about the death penalty?

MRS. ANGEL: Yes.

THE COURT: Personal reservations?

MRS. ANGEL: Personal reservations only.

THE COURT: Please listen to me very closely, are your reservations about the death penalty such that regardless of the law, the facts, and the circumstances of the case, you could not inflict the death penalty if you found beyond a reasonable doubt that the Defendants or either of them were guilty of murder in the first degree? Do you understand what I am asking you?

MRS. ANGEL: I would have to go along with the law, but regardless of the law, did you say?

THE COURT: Well, you understand, Mrs. Angel, if the State fails to prove the Defendants guilty beyond a reasonable doubt, it would be your duty along with the other Jurors to find the Defendant not guilty.

MRS. ANGEL: Right.

THE COURT: But if the State proved to your satisfaction and the other members of the Jury beyond a reasonable doubt that the Defendant or Defendants or either of them are guilty of murder in the first degree, the law of this state provides only one punishment, that is death. And so what I am asking you is, irrespective of that law, are the facts and circumstances of the case, is your reservations about your feelings about the death penalty such that irrespective of the facts of the case, are you saying that you could not vote for a penalty of death?

MRS. ANGEL: No, I think I am saying it would be difficult, but I would go ahead if beyond a reasonable doubt.

THE COURT: Then you could impose it if you found the facts to be such? You could do that?

MRS. ANGEL: Yes, if my conscience---

THE COURT: I won't excuse the Juror for cause at this time. [Tr. 15-22]

* * *

THE COURT: Mr. Hall, do you understand the nature of this case?

MR. HALL: I do.

THE COURT: And do you understand the explanation I have made about what type of case it is, and it is a case where the Defendants are charged with murder in the first degree?

MR. HALL: Yes.

"THE COURT: Mr. Hall, let me ask you this further question; I take it that you have personal or other reservations about the death penalty?

MR. HALL: Yes, sir.

THE COURT: All right. Are your reservations about the death penalty such that regardless of the law, facts, and the circumstances, of the case, you could not inflict the death penalty if you found beyond a reasonable doubt that the Defendant or either of them were guilty of murder in the first degree.

MR. HALL: I could not.

THE COURT: All right.

MR. HARRIS: We challenge him for cause, Your Honor.

THE COURT: Mr. Leatherman?

MR. LEATHERMAN: Object.

MRS. ASKINS: Object.

MR. JORDAN: Object, Your Honor.

THE COURT: All right, Mr. Hall, you will be excused for cause, you may step down, sir. Exceptions will be allowed both the Defendants by the ruling of the Court." [Tr. 25, 26]

* * *

"MR. HARRIS: . . . Mrs. Angel, you just don't believe in the death penalty, do you?

MRS. ANGEL: I just find it hard to believe in the death penalty. I am sorry. You know it is an opinion, a personal opinion. I would comply with the duty, I would have to if I served on this Jury.

MR. HARRIS: In other words, as the Court has told you, these Defendants were charged with murder while committing an armed robbery. Oklahoma Statutes make that a death penalty offense."

* * *

MR. HARRIS: Now, that being the case, you could put aside all your personal beliefs about the death penalty if you found beyond a reasonable doubt these two men committed murder while engaged in an armed robbery, you could find them guilty of first degree murder, and assess the death penalty, could you not?

MRS. ANGEL: I am going to revert to my first answer and say I am not sure, and I don't think I would be capable of serving on the Jury. I want to be fair, I really do. I don't want to get out of my duty, but I don't believe I could.

MR. HARRIS: You don't think you could serve on this Jury, you don't want to serve on this Jury feeling this type of case, do you? [sic]

MRS. ANGEL: I am sorry.

MR. HARRIS: We ask the Juror be excused for cause, Your Honor.

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"MR. LEATHERMAN: I object to it.

MRS. ASKINS: W[illegible]ject on the form on the form of the question, Your Honor. In proper voir d[illegible] question. The District Attorney attempts to draw his own---

THE COURT: Mrs. Angel, if I understand your answer to Mr. Harris, you don't believe, if the State proved to your satisfaction beyond a reasonable doubt that the Defendants while engaged in an armed robbery, committed murder in the first degree, that you could not vote the death peanlty; is that correct?

MRS. ANGEL: I would vote the death penalty, but it would upset me. You said would it do violence to my conscience, I think it would, I am trying to be fair.

THE COURT: Put if you found the facts to be such in this particular case?

MRS. ANGEL: I would. I would feel it my duty, I would have to, if I were on the Jury, yes, I would.

THE COURT: You understand if you should find, that is up to you as a Juror, I am not suggesting what you find, but should you find as a Juror these Defendants are guilty of murder in the first degree, that the punishment for it is death, you understand that?

MRS. ANGEL: Yes.

THE COURT: And if you found them guilty as Mr. Harris has asked you, would you and could you vote for the death penalty?

MRS. ANGEL: I would find it very hard, I will be honest. No, I don't believe I could.

THE COURT: You don't believe you could.

MRS. ANGEL: No, I don't believe I could. I am being completely honest.

THE COURT: You have answered me and Mr. Harris two or three different ways.

MRS. ANGEL: I know, I am trying to assess myself.

THE COURT: I want you to think about it. I want you to express your true and honest convictions about this matter.

MRS. ANGEL: I am trying to ask myself whether I will be able to do such, and I am not sure I would be able to, so I think the only fair thing for me to do, I perhaps won't be able to in all conscience vote for the death penalty.

THE COURT: Irrespective of the facts? I'll excuse the lady for cause, and Defendants, both Defendants, will be given an exception to the ruling.

MRS. ASKIN: Defendant Williams objects.

THE COURT: I have noted your objection, and given you an exception to the ruling." [Tr. 37-40]

APPENDIX B

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In 1972, this Court held that the penalty of death could not be inflicted under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Oklahoma's extant capital punishment statutes were thereby invalidated. Koonce v. Oklahoma, 408 U.S. 934 (1972); Fesmire v. Oklahoma, 408 U.S. 935 (1972); Menthen v. Oklahoma, 408 U.S. 940 (1972).[3]

Effective May 17, 1973, the Oklahoma legislature devised new measures for the imposition of the death penalty for the newly defined crime of first degree murder.[4] 21 Okla. Stat. Ann. §§701.1, 701.3, 701.5 and 701.6 (1975-76 Supp.). Under the 1973 enactment, homicides committed "without authority of law" and with "premeditated design" to effect death are murder in the first degree if committed under any of ten circumstances:

> "1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;
>
> "3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial

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3/ See also Pate v. State, 507 P.2d 915, 916 (Okla. Cr. App. 1973): "After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia."

4/ Prior to Furman, kidnapping for ransom, armed robbery and rape were also punishable in Oklahoma by death. 21 Okla. Stat. Ann. §745 (1958); 21 Okla. Stat. Ann. §801 (1958); 21 Okla. Stat. Ann. §1115 (1975-76 Supp.).

or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

If a first degree murder case is tried to a jury, the jury "shall determine only whether the defendant is guilty or not guilty . . . and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death."[5] In the event of a first degree murder conviction after a bench trial or upon a guilty plea, "the court shall enter a judgment and sentence of death."[6] The statute authorizes capital juries to be instructed "regarding

---

5/ 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

6/ Ibid.

lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions" and if "the judge . . . states into the record his reasons for giving the instruction based upon the evidence adduced at trial."[7] Although §701.3 states that "[e]very person convicted of murder in the first degree shall suffer death,"[8] §701.5 requires the Court of Criminal Appeals to conduct "an evidentiary hearing" in all death cases for the purpose of determining inter alia "whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Such "substantially disproportionate" death sentences must be modified to sentences of "life in the penitentiary at hard labor."[9]

7/ Ibid.

8/ Ibid.

9/ 21 Okla. Stat. Ann. §701.6. (1975-76 Supp.) Oklahoma has long permitted appellate review of criminal sentences in an unusual form. See Note, Criminal Procedure - Scope of Appellate Review of Sentences in Capital Cases, 108 U.PA.L.REV. 434, 436 (1960). Under 22 Okla. Stat. Ann. §1066 (1958), the Court of Criminal Appeals possesses power to " . . . modify the judgment appealed from." This power has been held to permit the modification of sentences, Dickman v. State, 336 P.2d 1113 (Okla. Cr. App. 1959), and has been used to reduce death sentences "in furtherance of justice," Murphy v. State, ____ Okla. Cr. ____, 112 P.2d 438, 457 (1941), on the basis of factors deemed mitigating by the appellate court, ibid.; Mitchell v. State, ____ Okla. Cr. ____, 60 P.2d 631 (1936); Methvin v. State, _____ Okla. 60 P.2d 1062 (1936); Peters v. State, ____ Okla. Cr. ____, 211 P.427 (1922), on the basis of factors thought to have prejudiced the judge or jury, Young v. State, ____ Okla. Cr. ____, 200 P.260 (1921); Mays v. State, ____ Okla. Cr. ,197 P.1064 (1921), on the basis of error deemed insufficiently substantial to warrant a new trial, Gibson v. State, 501 P.2d 891 (Okla. Cr. App. 1972); Sango v. State, _____ Okla. Cr. ____, 5 P.2d 400 (1931); Doublehead v. State, _____ Okla. Cr. ____, 228 P.170 (1924), or for no apparent or stated reason, Noble v. State, ____ Okla. Cr. ____, 6 P.2d 840 (1932); Jewell v. State, ____ Okla. Cr. ____, 273 P.366 (1929).

This was the law of Oklahoma as it stood at the time of the crime with which petitioner Michael Wayne Green was charged below, and at the time of petitioner's trial. It was changed, however, following petitioner's conviction and the imposition of a death sentence upon him by the trial court. In Williams v. State, 542 P.2d 554 (Okla. Cr. App. 1975), the Oklahoma Court of Criminal Appeals considered the federal constitutionality of the 1973 capital punishment statute. The court initially sustained the provisions of 21 Okla. Stat. Ann. §§701.1 and 701.3 (1975-1976 Supp.) (see pp. 2 - 41, 10 - 12 supra), governing capital sentencing at the trial level, 542 P.2d at 583-584, and it accordingly set the Williams appeal for the "evidentiary hearing" and sentence review prescribed by §701.5 (see pp. 4, 12 supra). But upon further reflection, it held that §§701.5 and 701.6 were unconstitutional insofar as those sections authorized appellate reconsideration and reduction of death sentences that were "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (see pp. 4, 12 supra); it vacated its order for an "evidentiary hearing" of Williams' appeal; and it affirmed Williams' death sentence as imposed by the trial court.

> "We are now of the opinion that 21 O.S. Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court then fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, §953. See also, Rule 2.12, 22 O.S.Supp.1974, Ch. 18, App. Nothing in this opinion shall preclude the de-

fendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S.1971, § 1080 et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense for which the legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the statutory provisions governing the particular crime charged. See, Brown v. State, Okl. Cr. 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First Degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases."

Id. at 583 - 84. The upshot was to leave Williams -- together with petitioner Green and others similarly situated[10/] -- subject to the penalties of death decreed upon them at the trial level without the opportunity for an evidentiary hearing and possible modification of their death sentences that had been provided by the Oklahoma statute in effect at the time of their respective offenses.

In State ex rel. Young v. Warren, 536 P.2d 965, 971 (Okla. Cr. App. 1975), the court further declared that:

10/ The Oklahoma Court of Criminal Appeals has thus far affirmed the death sentences of at least six similarly situated defendants. Davis v. State, 542 P.2d 532 (Okla. Cr. App. 1975); Williams v. State, 452 P.2d 554 (Okla. Cr. App. 1975); Justus v. State, 452 P.2d 598 (Okla. Cr. App. 1975); Lusty v. State, 452 P.2d (Okla. Cr. App. 1975); Rowbotham v. State, 452 P.2d 610 (Okla. Cr. App. 1975); Jones v. State, 452 P.2d 1316 (Okla. Cr. App. 1975).

"[s]ince the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:

"In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S. Supp. 1974, §701.3, and render unconstitutional the provisions of 21 O.S. Supp. 1974, §701.1, under the decisions of the United States Supreme Court in Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346."

See pp. 25 - 28 infra. Similar restrictions were placed upon jury instructions regarding lesser offenses and upon prosecutorial charging practices (or at least upon the practice of recharging by the filing of an amended information following dismissal of an initial charge) respectively in Murray v. State, 528 P.2d 739 (Okla. Cr. App. 1974), and Hanna v. State, 540 P.2d 1190 (Okla. Cr. App. 1975). See pp. 23 - 24 , 29 - 36 infra.

Petitioner's death sentence has been affirmed by the Court of Criminal Appeals in this context. The questions presented by his petition for certiorari, therefore, are:

(1) whether the retrospective invalidation of the appellate evidentiary-hearing and sentence-reduction provisions of Oklahoma's capital punishment statute violate the federal constitutional proscriptions against ex post facto laws and fundamental unfairness in criminal prosecutions (Part II infra);

(2) whether Oklahoma's procedures for the administration capital punishment continue -- notwithstanding the cosmetic surgery performed by the Oklahoma Court of Criminal Appeals -- to permit an arbitrarily selective

infliction of the death penalty that affronts Furman v. Georgia, 408 U.S. 238 (1972) (Part III (A) infra);

and

(3) whether the death sentence imposed upon petitioner is otherwise a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments (Part III (B) infra).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

The Court of Criminal Appeals' affirmance of petitioner's death penalty after judicially modifying on appeal the 1973 Oklahoma death penalty statute presents a substantial question under the Ex Post Facto Clause for this Court's review. First, by invalidating 21 Okla. Stat. Ann. §701.6 (1975-76 Supp.) which authorized the Court of Criminal Appeals to impose a sentence of "life in the penitentiary at hard labor" in some capital cases, it transformed a procedure whereby some first degree murderers would be sentenced to death and some to life imprisonment to one where all such persons would be sentenced to death; Second, by invalidating 21 Okla. Stat. Ann. §701.5 (1975-76 Supp.), it deprived petitioner of an important procedural right: an "evidentiary hearing" before the Court of Criminal Appeals on the question whether, inter alia, his death sentence was imposed on the basis of "any . . . arbitrary fact" or was "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".

Although the maximum sentence both before and after the Court of Criminal Appeals' September 17, 1975, decision remained the same, the range of punishments prescribed for first degree murder was made significantly harsher. In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the Court declared:

> "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is ex post facto . . . regardless of the length of the sentence actually imposed."

It is clear from the factual context in Lindsey that the words "increase in the possible penalty" mean a "possible increase in penalty", for both the old law and the new law provided a maximum sentence of fifteen years for grand larceny. The new law, enacted after petitioners' crime was committed, simply deprived the sentencing court of the power to impose a minimum sentence.[11/] The Court held that a sentence of imprisonment "for not more than fifteen years" imposed under this new law violated the Ex Post Facto Clause (despite the fact that such a sentence could have been imposed under the old law) because the new sentencing scheme was "more onerous" than the previous one. The Court reached its conclusion by stating flatly that the result reached below by the Court of Criminal Appeals would constitute an Ex Post Facto violation:

11/ Under the old law governing grand larceny, the sentencing court was required to fix a minimum term of between six months and five years, with the prisoner to be eligible for parole at any time after the minimum time was served; the new law provided that "the court . . . shall fix the maximum term of . . . sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crimes." Lindsey v. Washington, supra, 301 U.S. at 398.

> "It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." 12/

301 U.S. at 401 (emphasis added).

This case is squarely controlled by Lindsey. For the Court of Appeals' repeated insistence that Oklahoma had in 1973 enacted "an otherwise mandatory" scheme of capital punishment, Williams v. State, supra, 542 P.2d at 592, 594 recognizes that the legislature contemplated that some convicted first degree murderers would be ultimately sentenced to life imprisonment while others would receive the death sentence.

Affirmation of petitioner's death sentence after the 1973 Oklahoma death penalty was significantly altered is violative of the Ex Post Facto Clause for yet another reason. The Court's declaration in Kring v. Missouri, 107 U.S. 221, 235 (1883), that "[a]ny law passed after the commission of an offense which . . . '[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an ex post facto law," has been limited somewhat; and procedural changes which operate only "in a limited and unsubstantial manner to . . . [an accused's disadvantage" are not ex post facto. Beazell v. Ohio, 269 U.S. 167, 170 (1925). See Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Malloy v. South Carolina, 237 U.S. 180, 183 (1915). However, a law which enacts a "harsh and arbitrary"

12/ "Removal of the possibility of a sentence of less than fifteen years . . . operates to . . .[petitioners'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

Lindsey v. Washington, supra, 301 U.S. at 401-402.

procedural change, Beazell v. Ohio, supra, 269 U.S. at 170, or which takes from the accused a substantial right given to him by the law in force at the time of his crime "cannot be sustained simply because, in a general sense, it may be said to regulate procedure." Thompson v. Utah, 170 U.S. 343, 352 (1898). The Court of Criminal Appeals' ruling deprived petitioner of critically important procedural rights which are not "duplicitous" to existing procedures, Williams v. State, supra, 542 P.2d at 583. and which cannot be vindicated at a hearing on a motion for a new trial or at a post-conviction proceeding. For the Oklahoma Legislature explicitly chose to provide a hearing at which death sentences would be modified when "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Okla. Stat. tit. 21, §701.5, p.4 supra. The Court of Criminal Appeals recognized the importance of this provision when it ruled that "[a]ny attempt by this Court to delineate [a disproportionality standard] . . . would be equivalent to substantive legislation." Williams v. State, supra, 542 P.2d at 593. The Court's decision thus abolishes a procedure for demonstrating that a particular defendant's sentence is "disproportionate" (whatever the Legislature intended by this term).

It is established that the Due Process Clause imposes restraints upon courts which are identical to those imposed on legislatures by the Ex Post Facto Clause. Bouie v. Columbia, 378 U.S. 347 (1964).[13/] The Court should grant certiorari to determine

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13/ "The logical import of Bouie was . . . to extend the ex post facto principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction." Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970).

whether the Oklahoma Court of Criminal Appeals' affirmance of the death sentence in this case subjected petitioner to unconstitutional punishment under the Ex Post Facto and Due Process Clauses.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has heretofore granted certiorari and scheduled oral argument in five cases raising cognate questions under the respective capital-punishment procedures of the States of Florida, Georgia, Louisiana, North Carolina and Texas. Proffitt v. Florida, No. 75-5706; Gregg v. Georgia, No. 74-6257; Roberts v. Louisiana, No. 75-5844; Woodson & Waxton v. North Carolina, No. 75-5491; Jurek v. Texas, No. 75-5394. See also Fowler v. North Carolina, No. 73-7031. In the following subsections, we describe the incidents of Oklahoma law and practice which frame similar issues meriting review in petitioner's case.

A. The Perpetuation of Arbitrary Selectivity Under the 1973 Oklahoma Capital Punishment Statute.

Despite the enactment of new death-sentencing procedures in 1973 and their partial invalidation by the Court of Criminal Appeals in 1975, Oklahoma law continues to offer a broad array of discretionary outlets through which the actual infliction of death can be avoided in potentially "capital" cases and, conversely, a capriciously selected random number of "capital" defendants can be doomed while their indistinguishable counterparts are spared.

1. Prosecutorial Charging Discretion

Felony prosecutions in Oklahoma may be initiated by indictment or by information.[14] In the "vast majority of cases, criminal prosecutions are by information." Stone v. Hope, 488 P.2d 616 (Okla. Cr. App. 1971). The county attorney has "full and complete authority to say when an information shall be filed in a felony case." Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 410 (1938). It is his duty "to guard the interests of the state, and the public, and as a quasi judicial officer to determine, before an action is filed, whether or not matters complained of constitute an offense against the state." State v. Snelson, 13 Okla. Cr. 88, 162 p. 444, 445 (1917). His decision not to prosecute may not be superceded by the complainant, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947) or by the courts, Best v. Evans, 297 P.2d 379 (Okla. Cr. App. 1956); Ex parte Lewis, 85 Okla. Cr. 322, 188 P.2d 367, 383 (1948); Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 210 (1938).[15]

His decision to proceed may of course be checked if, upon preliminary hearing, a judge determines "either that a public offense has not been committed, or that . . . there is not sufficient cause to believe the defendant guilty thereof." 22 Okla. Stat. Ann. §262 (1969). The consequent dismissal of an information is appealable by the prosecution, State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla. Cr. App. 1972); and such a dismissal is also no bar to the prosecutor's refiling of an information and presenting additional evidence at a second preliminary hearing.

14/ Okla. Constitution Ann., Art. 2 §17 (1952), 22 Okla. Stat. Ann. §301 (1969).

15/ Although the grand jury might indict where the prosecutor fails or declines to proceed, it is limited in jurisdiction, 22 Okla. Stat. Ann. 338, and poorly equipped to investigate crimes and to institute prosecutions on its own initiative.

Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971); Harper v. District Court, 484 P.2d 891 (1971); Nicodemus v. District Court, 473 P.2d 312 (Okla. Cr. App. 1970).[16]

Oklahoma prosecutors are entrusted with the choice of charges upon which to proceed:

> "it was discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense."

Saxon v. State, 19 Okla. Cr. 58, 198 P.107, 108 (1921). See also State v. Sowards, 64 Okla. Cr. 430, 82 P.2d 324 (1938). Compare Winfield v. State, 44. Okla. Cr. 232, 280 P.630, 632 (1929) ("'[i]t is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed, but if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a lesser degree of punishment, a defendant cannot be heard to complain . . . .'"), with Stough v. State, 75 Okla. Cr. 62, 128 P.2d 1028, (1942) ("what charges should be filed against an individual is a matter for the discretion of the county attorney, but where the line of demarcation between offenses has a narrow margin, the safe practice, where the proof is uncertain is to charge the lesser offense"). The decision to proceed on lesser charges is therefore no more subject to challenge than the decision not to prosecute at all. And while the prosecutor's decision to modify a charge by amendment or by dismissal and refiling requires court approval in all cases of dismissal and in cases of amendment after the defendant has pleaded, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), traditionally the

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16/ Dismissals for failure to prosecute promptly, 22 Okla. Stat. Ann. §812 (1969) also do not bar reprosecution for the same offense. 22 Okla. Stat. Ann. §817 (1969).

prosecutor can expect approval where requested, see Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947), quoted at p. 25, infra.

It is against this background that State v. Hanna, 540 P.2d 1190 (Okla. Cr. App. 1975), was decided. In that case, the Court of Criminal Appeals took a state appeal from dismissal of an information charging murder in the first degree[17/] as an occasion to announce that the prosecutor's subsequent filing of a second-degree amended information was improper.

> "In conformance with our recent holding in State ex rel. Young v. Warren, Okla. Cr., 536 P.2d 965 (1965), we are of the opinion that the state's action in filing an amended information charging murder in the second degree also was erroneous, and the trial court is directed to enter an Order dismissing said information without prejudice to the State's filing a preliminary information, if it elects to do so."

540 P.2d at 1191. Hanna does not preclude amendment or dismissal, see 22 Okla. Stat. Ann. §§304, 815 (1956), and refiling lesser charges where the prosecutor is able to present evidence that the lesser offense occurred and fails to present evidence (which, assuredly the defendant has no motivation to present) that the defendant is guilty of murder in the first degree. Nor does Hanna bar the prosecutor from refiling and presenting evidence of defenses qualifying or contradicting the evidence of first degree murder presented at the initial preliminary hearing. The enforceability of the Hanna "rule" is doubtful in any case, since no party has reason to complain of a nonconforming amendment; and where there is not (as there was in Hanna) a fortuitous interlocutory appeal proceeding in which the prosecutor seeks simultaneously to justify his original charging decision while abandoning it, there

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17/ The trial court had been of the view that "armed robbery could not be committed with an electric iron, an electrical cord and heavy boots." The appellate court disagreed. Id. at 1191. Mr. Hanna was subsequently tried for murder in the first degree and convicted of manslaughter in the first degree, State v. Hanna, District Court, Cleveland County, No. CRF-75-496.

is no reason for any court to question whether his refiling reflects something more or less than his reassessment of the available evidence. Such judicial inquiry is the more unlikely inasmuch as the courts are without authority to require a capital prosecution; they can only (once again, as in Hanna) order dismissal of the less serious charge. Finally, Hanna deals merely with refilings; it neither does nor can restrict or regulate the prosecutor's initial charging determination; that determination remains as wholly discretionary and unaccountable as ever. The upshot is that an Oklahoma prosecutor retains complete and uncontrolled freedom in his original choice to charge or forgo charging a capital offense; and thereafter he retains considerable leeway, limited only by a vague[18] and virtually unenforceable directive of the Court of Criminal Appeals, to reconsider and alter his original choice.[19]

2. Plea Bargaining

The plea bargain, which accounts for up to ninety percent of all criminal convictions in the nation[20] and is "used quite extensively in Oklahoma,"[21] is also predominantly a matter of prosecutorial discretion. Although court approval is required

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18/ See note 35 infra.

19/ For all of the reasons that we have set forth in the text, the Hanna decision of the Court of Criminal Appeals effected no significant limitation of prosecutorial charging discretion in Oklahoma Capital Cases. Like the Young and Murray decisions discussed at pp. 25 - 28 , 29 - 36 infra, Hanna is essentially a cosmetic pronouncement which lacks operational substance. Nevertheless, we may also note that, since Hanna was not decided until September 19, 1975, it could not even arguably have affected the prosecutorial charging practices in use at the time that petitioner's case was "papered" as capital first degree murder.

20/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

21/ Note, Plea Agreements in Oklahoma, 22 OKLA. L. REV. 81, 83 (1969).

for the dismissal, partial dismissal or amendment required to allow a plea to a lesser charge, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), the county attorney "is the legal representative of the state charged with the responsibility of investigating and prosecuting all public offenses, [and] the trial judge will ordinarily accept his recommendation and dismiss the action." Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280, 286 (1947).

It is true that, in an interlocutory proceeding brought to challenge trial court orders changing venue and granting bail in a capital case,[22] the Court of Criminal Appeals noted that plea discussions had been had and thereupon announced that guilty pleas to lesser charges could not be entered in a capital case unless the State established "by competent evidence" "that the defendant . . . was guilty of the lesser included offense, and not Murder in the First Degree," State ex rel. Young v. Warren, supra, 536 P.2d 965, 971[23] (1975).[24] The Young opinion leaves unclear whether the State is required to convice the court of the defendant's guilt of the lesser and innocence of the greater charge, or merely to show that there is sufficient evidence to raise a question as to which crime was committed. But surely no party to a

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22/ State ex rel.Young v. Warren, supra, Application and Petition dated March 7, 1975 (Okla. Ct. of Cr. App.No.0-75-103.)

23/ See pp. 14-15 supra. This felony-murder prosecution, involving six codefendants, resulted in two discharges on the basis of grants of immunity. Id. at 968, two death sentences, State v. Henson, Muscogee County District Court, No. CRF-74-355 (1975), State v. Bias, Creek County District Court, No. CRF-74-123 (1975), and two pleas to manslaughter in the first degree after testimony that the defendants were intoxicated at the time of the offense. State v. Gregory, Creek County District Court. No. CRF-74-123 (1975); State v. Gibson, Creek County District Court, No. CRF-74-123 (1975).

24/ At the same time, the court specifically announced that grants of immunity, see, Okla. Constitution Ann., Art. 2 §27; 21 Okla. Stat. Ann. §1367, remained acceptable in capital and in non-capital cases. See note 23, supra.

proposed plea agreement will be motivated to contest the sufficiency of evidence that the defendant is guilty only of the lesser offense. Enforcement of the Young "rule," like the Hanna "rule," supra, therefore depends upon a decision of the trial judge to make an unsolicited, independent evaluation of the facts of the case -- or upon the initiation of an unrelated incidental proceeding which might provide the occasion for an appellate pronouncement.

Whether for this reason or because (as we shall see at note 35 infra) the imponderable quality of the legal elements that set off first degree murder from its lesser included offenses ordinarily makes it impossible for a trial court to rule out the propriety of a less-than-first-degree-murder conviction, the fact is that plea bargaining continues in Oklahoma capital cases after and notwithstanding Young. Indeed, in an informal survey limited in time and resources, counsel have been able to document fourteen (14) plea bargains in capital cases since Young:

> Jerry Wayne Freeman, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Dean Joseph Odom, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
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> Charles Edward Anderson, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to first degree manslaughter and was sentenced to forty years imprisonment.
>
> William Eugene Craine, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to manslaughter in the first degree and was sentenced to forty years imprisonment.
>
> Richard Allen Pinkinpaugh charged with murder for hire in the District Court, Oklahoma County, No. CRF-74-1542 pleaded guilty on January 13, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Gary Dale Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Raymond Lee Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Phillip Brandon Ervin, charged with murder in the course of armed robbery, District Court, Cleveland County, No. CRF-75-87, pleaded guilty on May 27, 1975 to manslaughter in the first degree and was sentenced to twenty years imprisonment.

Kenneth Eugene Harwell, charged with murder in the course of robbery with firearms, Oklahoma County District Court, No. CRF-75-60, pleaded guilty on November 19, 1975 to manslaughter in the first degree and was sentenced to ten years imprisonment.

Charles Henry Hilliard, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on November 13, 1975 to manslaughter in the first degree and was sentenced to seven years, three to be served in the penitentiary and the remainder to be suspended.

Glen Raymond Parker, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on September 29, 1975 to murder in the second degree and was sentenced to ten years to life imprisonment.

Allen Clayburn Justus, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-109, charge dismissed June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF 74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Bobby Joe Williams, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-108, charge dismissed, June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Richard Sonny Erwin, charged with murder of a child, District Court, Pottawatomie County, No. CRF-75-181, pleaded guilty on January 9, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Whether the prosecutorial decisions to make these compromise dispositions were based exclusively upon an evidentiary showing that the crimes in each case were "not Murder in the First Degree" as initially charged, State ex rel. Young v. Warren, supra, 536 P.2d at 971, is, in the nature of the plea-bargaining process, an inscrutable question. Obviously, however, the defendants would have little incentive to charge-bargain in cases where the evidence could only make out less than first degree murder. So it is most likely that post-Young bargains are being made -- as plea bargains have always been made in Oklahoma -- upon a broader basis that includes consideration of the nature of the crime,[25] "the age, record, attitude, and mental condition of the accused," "the strength of the prosecutor's case and the identity of his witnesses"[26] and the philosophy and attitudes of the local prosecutor.[27] [28]

25/ Note, Plea Agreements in Oklahoma, 22 Okla. L. Rev. 81, 83 (1969).

26/ Id. at 84.

27/ Id. at 83:

> "One prosecuting attorney said that he simply would not negotiate with one who is accused of [murder]; . . . however, another prosecuting attorney said that due to the unpredictability of juries, no matter how serious the crime, he will consider a negotiation to make sure that the accused gets some kind of punishment."

28/ In addition, we may note that the Young case was not decided until May 7, 1975. See note 19 supra.

3. Jury Discretion

An Oklahoma jury may, in any case,

> "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. . . ." 29/

Multiple-count indictments or informations charging offenses of varying severity in the alternative are authorized, 30/ under which the jury may convict of lesser offenses not technically "included" in the greater. The only limitation upon a capital jury's power in these regards is defined by §701.3 of the 1973 capital punishment statute (pp. 3-4, 11-12 supra), which forbids the submission of evidentially unsupported lessers, Murray v. State, 528 P.2d 739, 740-741 (Okla. Cr. App. 1974), and provides that a trial judge who instructs the jury upon "lesser and included offenses and lesser degrees of homicide . . . shall state into the record his reasons for giving the instructions based upon the evidence adduced at trial."

29/ Okla. Stat. Ann. tit. 22, §916. See also, 22 Okla. Stat. Ann. §915:

> "Whenever a crime is distinguished into degrees, the jury, if they convict a defendant, must find the degree of the crime of which he is guilty."

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> "[A]n indictment or information must charge but one offense, but where the same act constitutes different offenses, or the proof may be uncertain as to which of the two or more offenses the accused may be guilty of, the different offenses may be set forth in different forms or degrees under different counts."

22 Okla. Stat. Ann. §404 (1969).

The Murray case just cited was -- like the Hanna and Young cases previously discussed[31] -- an opinion in which the Oklahoma Court of Criminal Appeals pronounced its views upon an issue neither presented nor argued before it, in an apparent concern to ease the tension between Furman and the 1973 law. Two jointly tried defendants, indicted for first degree murder and convicted of second degree murder, urged upon appeal that their pretrial motions for a severance and separate trials had been improperly denied. They prevailed on this contention, and therefore secured reversal of their convictions. The Court of Criminal Appeals added:

> "From a review of the record we further find that the trial court instructed the jury on the offense of Murder in the Second Degree, this being the crime for which the defendants were convicted. It is our opinion, and we so hold, that the evidence in this case did not warrant a Second Degree Murder instruction. The evidence presented was that there was an armed robbery and a homicide. Under this evidence the defendants were either guilty of Murder in the First Degree, or nothing. . . . Therefore, on a retrial of this matter, the trial court should not instruct the jury on the offense of Murder in the Second Degree."

528 P.2d at 740-741. Perhaps because of the way in which the issue arose (or, more accurately, did not arise) in Murray, the court not merely overlooked the impossibility of retrying the

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31/ See pp. 23-28 supra.

defendants for first degree murder,[32] but also failed to explain how -- in any live controversy upon a concrete factual record -- an Oklahoma trial or appellate court could rule as a matter of law that the evidence does not warrant a less-than-first-degree murder instruction. For under Okla. Stat. Ann. §701.1 (1975-1976 Supp.), pp.2-3 supra, neither robbery-murder nor murder in any of the ten enumerated statutory situations constitutes first degree murder unless it is also premeditated; and the presence or absence of the mental state of premeditation is a jury question. It was for this reason, for example, that the trial judge in petitioner's case charged the jury on first degree manslaughter (see pp. 7 - 8 supra), although petitioner had killed a police officer within §701.1(1).

32/ See Price v. Georgia, 398 U.S. 323 (1970). In the case of Murray's codefendant, indeed, the United States District Court for the Western District of Oklahoma has already held that double jeopardy bars the retrial "on the charge of Murder in the First Degree" ordered by the Court of Criminal Appeals in Murray v. State, supra, 528 P.2d at 741. See Grizzle v. Turner, 387 F. Supp. 1 (W. D. Okla. 1975).

Murray does not purport to change the settled law of Oklahoma that, in homicide cases, the court must submit to the jury an instruction upon every degree of homicide which any reasonable view of the evidence suggests, Isaac v. State, 83 Okla. Cr. 33, 172 P.2d 806, 808-809 (1946);[33] that the judge is not to weigh the evidence in formulating his instructions, Lawson v. Territory, 8 Okla. 1, 56 P. 698, 700 (1899);[34] that "[w]here the evidence shows any element of manslaughter, however slight, an instruction defining that degree of homicide is proper," Ging v. State, 31 Okla. Cr. 428, 239 P. 685, 688-689 (1925); that "if there is any doubt about the matter in the mind of the court, the lower degree of the homicide should be submitted for the consideration of the jury," Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 383 (1942); that lesser-offense submissions will be sustained even upon "rather a strained construction" of the evidence, Warren v. State, 6 Okla. Cr. 1, 115 P. 812, 817 (1911); that factual questions regarding a defendant's

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33/ Lesser-offense instructions may be required by the evidence even in the absence of a defense request. See, e.g., Myers v. State, 480 P.2d 950, 952 (Okla. Cr. App. 1969).

34/ Thus, for example, the uncorroborated testimony of a defendant suffices to support and require a lesser-offense charge. Shirey v. State, 520 P.2d 701, 703 (Okla. Cr. App. 1974).

mental state are ordinarily jury issues requiring submission of lesser-offense instructions, Laymon v. State, 513 P.2d 883, 885 (Okla. Cr. App. 1973); Gibson v. State, 501 P.2d 891, 899-900 (Okla. Cr. App. 1972); and, in particular, that any "reasonable doubt . . . as to whether or not the killing was committed with a premeditated design to effect . . . death" supports a lesser offense instruction, Jones v. State, 523 P.2d 1126, 1132 (Okla. Cr. App. 1974) -- even where, as in Jones, the defendant's version of the relevant events is that he was out of the room when his alleged victim committed suicide. In the framework of these principles, it will be the rare case, if any, where the element of "premeditated design" that is prerequisite to a capital first degree murder conviction will not require factual resolution by the jury and support a lesser-offense instruction, thus performing its historic office of "giving [the jurors a] . . . dispensing power [veiled] . . . in a mystifying cloud of words," CARDOZO, LAW AND LITERATURE 100 (1931). For this element "is so obscure that no jury hearing it for the first time can fairly be expected to understand it," ibid.;[35/] and it therefore represents

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35/ The elements which define first degree murder, second degree murder, and manslaughter are exceedingly amorphous. First degree murder (and one form of second degree murder) are characterized by a "premeditated design to . . . effect death." Okla. Stat. Ann. tit. 21, §§701.1, 701.2(1)(1975-1976 supp.). "Design" and "Premeditation" are statutorily defined:

> "Design to effect death inferred[.] A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed"; (Okla. Stat. Ann. tit. 21, §702 (1958));

the classic archetype of those ungraspable mental elements so

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35/ cont'd.

> "Premeditation[.] A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution"; (Okla. Stat. Ann. tit. 21, §703 (1958)).

The Court of Criminal Appeals has frequently discussed the concept of "premeditated design":

> "'A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution . . . The time requisite to constitute premeditated design may not be distinguishable from the act of the killing, although it may be said to precede the act . . . Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."'"

Easley v. State, 78 Okla. Cr. 1, 143 P.2d 166, 170 (1943)(quoting Basham v. State, 47 Okla. Cr. 204, 287 P. 761, 762 (1930)). Moreover, "'[a] premeditated design to effect death * * * is no more nor less than a mental purpose to take human life.'" Walker v. State, 91 Okla. Cr. 1, 214 P2d. 961, 963 (1950). This mental purpose is "'"formable on the instant preceding the fatal act or some time theretofore, it being sufficient that there be a precedent existence of the purpose and persistency of it to and inclusive of such fatal act."'" Easley v. State, supra, 143 P.2d at 171. See also Jones v. State, 94 Okla. Cr. 359, 236 P.2d 102, 107 (1951); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974)(defendant could have formed premeditated design to kill between firing second and third pistol shot while he engaged in drunken horseplay). Moreover, "[i]f a killing is occasioned by the use of a deadly weapon, then the design to effect death may be inferred from the fact of the killing." Gatewood v. State, 80 Okla. Cr. 135, 157 P.2d 473, 475 (1945).

A similar gloss does not exist for the element defining one form of second degree murder, "a depraved mind, regardless of human life," see Holmes v. State, 6 Okla. Cr. 541, 119 P. 430, 440 (1911), although Okla. Stat. Ann. tit. 21, §705 (1958) provides that a homicide perpetrated by an act "imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others." See generally, CANNON, AN ANALYSIS OF THE NEW MURDER LAW OF OKLAHOMA (1974).

"refractory to the best-instructed human understanding"[36] that they not merely permit but inescapably require any jury to "conceal from itself its own response to sentiment, under the guise of resolving issues of evidential doubt."[37]

> "[N]o matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve lay persons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless."[38]

And if "'[i]t sometimes happens [that] the jury, in arriving at a verdict, does so by a compromise and fixes a lower degree than the undisputed evidence may disclose,'" Abel v. State, 507 P.2d 569, 572 (1973), (quoting Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 384 (1941)), surely this extra-legal process is most likely to reflect the "natural human tendency to see

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36/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

37/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

38/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

facts and to evaluate evidence in a manner leading to a desired conclusion"[39] where the stakes are life or death[40] and where the enormity of those stakes is forcibly brought home to the jurors by the requirement that they "state affirmatively in their [first degree murder] verdict that the defendant shall suffer death."[41]

39/ BLACK, op. cit. supra note 38, at 46.

40/ The resort by juries even to verdicts of acquittal as a means of avoiding capital convictions" in cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty" is an historical commonplace. McGautha v. California, 402 U.S. 183, 199 (1971). See the authorities collected in the Brief for Petitioner, Fowler v. North Carolina, No. 73-7031, at pp. 90-92 n.122.

41/ Okla. Stat. Ann. tit. 21, §701.3 (1975-1976 Supp.), p. supra. The Court of Criminal Appeals has indicated that the omission of such a statement would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-79, but the requirement serves nonetheless to assure that the jury is aware of the life-or-death consequences of its choice of a verdict.

4. Executive Clemency

Under Okla. Const. Ann., art. 6, §10 (1952), and 57 Okla. Stat. Ann. §332 (1969), the Governor of Oklahoma possesses absolute power to commute and pardon -- or to decline to commute or pardon -- as he chooses. The only limitation upon these powers as they apply to capital cases is the requirement that, before the Governor may permanently change a sentence to be served, he must receive a recommendation in the case from the Board of Pardons and Paroles. He need not follow the recommendation, but need only receive it. There are no restrictions or controls upon -- or standards, rules or principles to regulate -- the Board's discretion or the Governor's. "An abuse of the pardoning power [which is conferred in the same terms as the power of commutation] does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon . . . . "Ex parte Crump, 10 Okla. Cr. 133, 135 P.428, 431 (1913).

Since the Court now has before it lengthy briefs in cases from five States raising the question of the constitutionality of capital punishment under the Eighth Amendment, we see no reason to extend the present Petition beyond description of the local Oklahoma doctrines, practices and procedures that present a similar question in petitioner's case. Oklahoma's system for the administration of the death penalty differs in details from those of Florida, Georgia, Louisiana, North Carolina, and Texas -- just as the systems of the latter five States differ from each other in details -- but the differences are insignificant in contrast to the similarities. Arbitrary selectivity in

the choice of those who die or live remains the common characteristic of death-sentencing schemes from State to State, after Furman as before, and however much the numerous discretionary judgments which together doom or spare be diffused, disguised, or papered over with the language of "mandatory" or "automatic" death penalties. For, in fact,

> "[t]he change to a mandatory system . . . [simply has] the effect of shifting some of the discretion exercised by the jury [before Furman] to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty." 42/

B. The Excessive Cruelty of the Death Penalty

This aspect of the Eighth Amendment question presented here is identical to the questions raised in the Fowler, Proffitt, Gregg, Roberts, Woodson-Waxton and Jurek cases, p. 20 supra, and discussed particularly in the respective Parts III of the Briefs for Petitioner in Fowler (No. 73-7031) and Jurek (No.75-5394).

42/ White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 13 DUQ. L. REV. 279, 289 n.69 (1974). See also BLACK, op. cit. supra note 38, at 92-93.

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6639

BOBBY JOE WILLIAMS and
ALLEN CLAYBURN JUSTUS,

Petitioners,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF OPPOSING CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

BOBBY JOE WILLIAMS and ALLEN CLAYBURN JUSTUS,	)	
Petitioners,	)	
-vs-	)	No. 75-6639
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Bobby Joe Williams and Allen Clayburn Justus, hereinafter referred to as petitioners, were convicted of Murder in the First Degree. Their sentences of death were affirmed on appeal to the Oklahoma Court of Criminal Appeals, reported below as Williams and Justus v. State, Okl. Cr., 542 P.2d 554 (1975).

Mandate was stayed below pending resolution of issues raised in the Petition for Rehearing and after oral argument was presented upon consolidated hearing, the Court's decision was reaffirmed, 542 P.2d at 591.

REASONS FOR NOT GRANTING WRIT

Invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6 by Oklahoma Court of Criminal Appeals raises no constitutional issue where, as here, petitioners are not within the class addressed by stricken statutes. Invalidation thereof is not within the ex post facto proscription of Article I, §10 of the United States Constitution, nor deprives petitioners of any constitutional right.

Oklahoma's mandatory scheme of capital punishment does not permit infliction of the death penalty contra to Furman v. Georgia, 408 U.S. 238 (1972), nor is death sentence imposed otherwise cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendment of the United States Constitution.

Exclusion of veniremen for just cause is not repugnant to the Sixth and Fourteenth Amendments to the United States Constitution.

Procedure used in determining voluntariness of confession did not deny petitioner Williams due process of law.

ARGUMENT AND AUTHORITIES

I.

INVALIDATION OF 21 O.S. SUPP. 1974, §§701.5, 701.6 BY OKLAHOMA COURT OF CRIMINAL APPEALS RAISES NO CONSTITUTIONAL ISSUE WHERE, AS HERE, PETITIONERS ARE NOT WITHIN THE CLASS ADDRESSED BY STRICKEN STATUTES; INVALIDATION THEREOF IS NOT WITHIN CONSTITUTIONAL EX POST FACTO PROSCRIPTION OF ARTICLE I, §10 OF THE UNITED STATES CONSTITUTION, NOR OTHERWISE DEPRIVE PETITIONERS OF ANY CONSTITUTIONAL RIGHT.

Petitioners' contention is based upon the invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6[1], which they claim[2] deprived them of the opportunity for an evidentiary hearing contemplated therein, thereby negating the possibility of a reduced sentence.

As stated in Section 701.5, the purpose of the evidentiary hearing was to determine if the sentence of death comports with the principles of due process and equal protection of the law. The evidentiary hearing contemplated

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1. Quoted verbatim, petitioners' brief, pages 6; and by Court, Opinion On Rehearing, 542 P.2d at 592.

2. Petitioners' brief, Appendix B. page 14.

therein was duplicitous, as reocgnized by the State Appellate Court.[3]

Petitioners have never contended that their sentences were a result of any factor listed within the stricken statutes, although expressly invited to do so during oral argument below.[4] Certainly, any factor or evidence regarding such constitutional protections as due process and equal protection could have been presented to the trial court and reviewed on appeal, notwithstanding the stricken statutes. At this late date, petitioners have yet to make such claim, presumably because they are not among the class of persons within the purported ambit of the stricken provisions.[5]

Petitioners' claim that the instant case is squarely controlled by a prior decision of this Court,[6] misconstrues the holding therein. In the cited case, the penalty for Grand Larceny at the time of the offense was "for not more than 15 years." The Legislature changed the law after the commission of the crime, but before sentencing, making the 15 year sentence mandatory. This Court held the new law was ex post facto because the legislative change occurred after the crime was committed.

In the instant case, the mandatory penalty of death under 21 O.S. Supp. 1974, §701.3 was in effect at the time of the offense and during the time petitioners were charged, tried, convicted and sentenced to death. Subsequently, the State appellate court held the provisions of 21 O.S. Supp. 1974, §§701.5, 701.6 unconstitutional. Those provisions

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3. Opinion on Rehearing, Williams and Justus v. State, Okl. Cr., 542 P.2d 591, at page 594.

4. 542 P.2d at page 597, par. [71].

5. At 542 P.2d at page 597, the State court specifically found that petitioners' were not within the class of persons contemplated within the stricken statutes.

6. Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), petitioner's brief, Appendix B, page 18.

purportedly authorized the appellate court to modify the death sentence only if such death sentence was found to have been a result of specified factors therein which resulted in denial of due process or equal protection of the law.

Petitioners have made no claim at any time, during trial, on appeal, or in their petition for certiorari, that their death sentences were affected by any factor within the stricken provisions.

This Court has never held that the purpose of the ex post facto clause was to serve as a restraint upon the judiciary, but has, in fact, held contra in Ross v. Oregon, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and, United States v. Rundle, 383 F.2d 421 (3rd Cir. 1967), cert. denied, 393 U.S. 863, 89 S.Ct. 144, 21 L.Ed.2d 131. The provision was intended to secure substantial personal rights against arbitrary and oppressive legislation. See Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915). Respondent is fortified in this position by the history of the ex post facto clause. See, e.g., Ex Post Facto in the Constitution, 20 Michigan Law Review 315 (1921) and The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws, 14 University of Chicago Law Review 539 (1947).

Although the due process clause is admittedly a brother to the ex post facto provision, there exists a danger in treating them alike. See Footnote 3 in separate opinion by Justices Harlan and Frankfurter in James v. United States, 366 U.S. 213, 247, 6 L.Ed.2d 246, 270, 81 S.Ct. 1052 (1961). In Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), this Court considered ex post facto rationale in deciding a due process question. There, this Court held that the State appellate court had enlarged the meaning of the statute and the defendants were thereby denied due process because they had no notice that their

actions constituted a criminal offense at the time of their acts. This decision is nowhere analogous to the instant case. Other cases cited by petitioners are likewise distinguishable.

II.

OKLAHOMA'S SCHEME OF MANDATORY CAPITAL PUNISHMENT DOES NOT PERMIT INFLICTION OF THE DEATH PENALTY CONTRA TO FURMAN V. GEORGIA, 408 U.S. 238 (1972), NOR ARE THE DEATH SENTENCES IMPOSED UPON PETITIONERS OTHERWISE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Generally, petitioners cite a number of cases antedating current capital punishment statutes with the inference that the former affects the latter. However, Oklahoma's procedure was significantly changed by the enactment of current capital punishment legislation and respondent submits that no State in the Union has exceeded Oklahoma in curbing arbitrary discretion.

PROSECUTORIAL DISCRETION

To say that the prosecutor has no discretion in determining the charge to be filed would be inaccurate, because admittedly he does. No system has yet been devised, if indeed such a system is possible, to ensure that the prosecutor uses correct judgment in the selection of the charge to be filed. However, this is not to say that the prosecutor has unlimited discretion. Petitioners recognize that once a charge is filed, any action relating to the disposition thereof requires court approval.[7] Oklahoma procedure also requires the examining magistrate at a preliminary

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7. Petitioners' brief, Appendix B, page 22.

hearing to direct the accused to be held for trial on a charge which the evidence reflects, not necessarily the crime charged.[8] Further, in response to Furman, the Oklahoma Court of Criminal Appeals has held that once the accused has been arraigned for a capital offense, the State cannot simply enter into a plea bargain agreement. The State must establish by competent evidence that the accused committed the lesser offense and is not guilty of Murder in the First Degree as a predicate for the District Court to approve a reduction of the charge. State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965 (1975).

JURY DISCRETION

Oklahoma requires assessment of the death penalty upon the conviction of Murder in the First Degree, 21 O.S. Supp. 1974, §701.3. Petitioners stress that Oklahoma procedure also provides for instructing the jury regarding a lesser included offense,[9] but only where warranted by the evidence. Surely petitioners do not suggest such instruction should not be given irrespective of the evidence, for such procedure most certainly would be fundamentally unfair to any accused. Petitioners' argument in this regard inherently calls for condemnation of jury determination in capital

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8. 22 O.S. 1971, §264, provides:

> "Defendant held to answer.
>
> "If, however, it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must in like manner indorse on the complaint an order signed by him to the following effect:
>
> "It appearing to me that the offense named in the within complaint mentioned (or any other offenses, according to the fact, stating generally nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same."

cases and necessarily presents a separate and distinct approach regarding the constitutionality of the death penalty itself. If this Court should adopt petitioners' concept, then our present system of criminal jurisprudence must necessarily be dismantled, for the traditional role of a juror to judge the credibility of witnesses, weigh the evidence and be a trier of fact, is inextricably woven into our system of justice.

In this connection, petitioners' contention presents a mild irony in light of the majority view of Furman. Petitioners, who are white, did not receive an instruction regarding a lesser included offense, while William Provo, a black,[10] will be given a new trial because the trial court committed fundamental error by failing to instruct the jury on Manslaughter in the First Degree under the evidence adduced.[11]

Delaware is the only jurisdiction respondent notes to seemingly accept the view that prohibitive discretion remains where the judge or jury trying the case may find the accused guilty of a lesser included offense, State v. Sheppard, Del.Sup., 331 A.2d 142 (1975) citing dictum from State v. Dickerson, Del. Sup., 298 A.2d 761, 769-770 (1972). Other jurisdictions do not accept this view, e.g., State v. Selman, La., 300 So.2d 467 (1974); State v. Dixon, Fla., 283 So.2d 1 (1973); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); Jurek v. State, Tex.Crim.App., 522 S.W.2d 934 (1975).

EXECUTIVE CLEMENCY

In the post-Furman case of Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974), this Court recognized

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10. Petitioners' brief, Green v. Oklahoma, No. 75-6451, page 1b.

11. Provo v. State, Okl. Cr., ____ P.2d ____, appellate No. F-75-301, issued April 20, 1976.

that the very essence of the pardoning power is to treat each case individually and that individual acts of clemency inherently call for discriminating choices, because no two cases are the same. None of the members of this Court suggested in Furman that executive clemency resulted in invidious discrimination therein criticized.

III.

EXCLUSION OF VENIREMEN FOR JUST CAUSE IS NOT REPUGNANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent submits that petitioners misconceive the rationale of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), wherein the viewpoint of five Justices expressed through Mr. Justice Stewart, was stated in pertinent part at 391 U.S. 518, 20 L.Ed.2d 782:

> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it sees fit,' a jury that must choose between life imprisonment and capital punishment can do little more . . . and must do nothing less . . . than express the conscience of the community on the ultimate question of life or death." (Emphasis added)

The question raised can be phrased quite succinctly:

> In a jurisdiction where the penalty of death is mandatory, is it constitutional error to exclude a juror whose reservations regarding the mandatory death penalty are such that he either cannot vote to convict or is unresolved as to whether he could vote to convict, even though convinced beyond a reasonable doubt that the accused is guilty of the capital offense?

If this be error, then any proposed scheme providing for mandatory death must ultimately fall, whether the punishment be assessed by court or jury, simply because common sense dictates that the public from which the jury is

impaneled could not be presumed to be ignorant of the penalty which must follow a determination of guilt. The result of accepting unqualified veniremen seems obvious. In the final analysis, petitioners' argument regarding the exclusion of unqualified veniremen is nothing less than an attack upon the mandatory death penalty itself.

The "conscience of the community" is no longer left to jury decision in capital cases, but is reflected in statutory provisions enacted by elected representatives of the people. Assuming arguendo, that unqualified veniremen were not excused for cause, how could the trial court properly administer the oath requiring them to truly try the case and instruct them as to the law that must be followed, the court having been forewarned that they do not know whether they could follow the law? Respondent knows of no case holding that a jury may properly ignore or reject an instruction of the trial court. Certainly, the trial court must not accept a juror who doesn't know whether he can follow the law. Otherwise, the administration of the oath would be frivolous, thereby creating a chaotic system of jurisprudence which would be a mockery based upon personal whims of individuals. See, e.g., dialogue and response of Mrs. Angel, 542 P.2d 554, at page 589.

Further, although petitioners state that under Oklahoma's post-Furman procedure, the jury acts simultaneously to determine both guilt and punishment,[12] the jury is not authorized to determine punishment. The jury must state in their verdict that the defendant shall suffer death, that penalty having been predetermined by law under 21 O.S. Supp. 1974, §701.3.[13]

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12. Petitioners' brief, page 21.

13. Petitioners' brief, page 5.

PROPOSITION IV

PROCEDURE USED IN DETERMINING VOLUNTARINESS OF CONFESSION DID NOT DENY PETITIONER WILLIAMS DUE PROCESS OF LAW.

Petitioner Williams further contends the ruling by the trial court regarding his confession did not meet the requirements of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.12 908 (1964) as interpreted by Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967).[14]

In Sims v. Georgia, supra, this Court explained the constitutional rule as laid down in Jackson v. Denno, supra, that a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given.

In the instant case, the trial judge stated, "I don't find under the evidence in this case that as a matter of law, that it is unvoluntary (sic) statement." (Tr. 309). Petitioner's suggestion that the "matter of law" considered by the trial court conceivably referred to the Fifth Amendment privilege[15] was not suggested by petitioner to the State Court on appeal below.

The Oklahoma Court of Criminal Appeals stated that although the trial court could have more distinctly expressed his independent determination that the confession was voluntary, the trial court's conclusion is clearly ascertainable from the record. The Court recognized that Oklahoma has long followed the Massachusetts' rule,[16] which was not questioned by this Court in Jackson v. Denno.

Respondent submits that a singular confession cannot be accepted as partially voluntary and the fact that the trial

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14. Petitioners' brief, page 27.

15. Petitioners' brief, page 28.

16. 542 P.2d at page 572.

judge expressed his finding in the negative, rather than in the affirmative, is not error.

The records reflect that petitioner sent word to the officer that he would like to talk with him. Petitioner talked with the officer on this occasion and signed the statement, State's Exhibit No. 2 (Tr. 261). The police report clerk, Elizabeth Huff, testified:

> "Detective Knight asked Bobby Joe Williams was he ready to give the statement then or did he want to wait. He seemed a little uneasy, and he said he wanted to go ahead and get it all out and get it all over with." (Tr. 574)

She added that questions and answers were taken down by her word for word (Tr. 575). However, the petitioner testified that he didn't say, "that stuff," but told him (Detective Knight) that he knew, "it was going to happen," but that this statement was a lie (Tr. 504A-506).

After considering the evidence adduced by the petitioner and that adduced by the State, the trial court did not find as a matter of law that the statement was "unvoluntary" (sic) (Tr. 308, 309).

Ironically, after conviction and appeal below, petitioner Williams purportedly signed an affidavit admitting that he committed the Murder, but claimed he perpetrated the crime while acting alone.[17]

In Jackson v. Denno, supra, this Court distinguished the New York procedure condemned therein from that of Massachusetts, which Oklahoma followed. In Sims v. Georgia, supra, there existed no ruling or finding in the record showing that the trial judge determined the voluntariness of the confession, even though part of petitioner's testimony was uncontradicted. Here, the record clearly reflects the trial court's determination. Respondent submits that petitioner Williams seeks to extend the holding in those cases beyond their intended scope.

CONCLUSION

Therefore, premises considered, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record, this 21st day of May, 1976:

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